JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102

Report Summary

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Justice Joyce L. Kennard, Chair
Appellate Rules Project Task Force
Peter J. Belton, Chair
Heather Anderson, Committee Counsel, 415-865-7691

DATE: August 6, 2003

SUBJECT: Revision of Appellate Rules: Third Installment—Rules 30–36.3 (repeal Cal. Rules of Court, rules 30–36, 37–38, and 39.50–39.57; adopt revised rules 30–36 and 36.3 and related Advisory Committee Comments; amend rules 36.1 and 36.2) (Action Required)

Issue Statement
This is the third installment of the Appellate Advisory Committee's multiyear project to revise the appellate rules of the California Rules of Court. It addresses the rules governing the hearing and decision of appeals in noncapital criminal cases and appeals from judgments of death. The revision is necessary because many provisions of the rules have become unduly complex, difficult to understand, or inconsistent with current law and practice.

Recommendation
The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2004:

1. Repeal existing rules 30–36, 37–38, and 39.50–39.57 of the California Rules of Court;

2. Adopt revised rules 30–36 and 36.3 and related Advisory Committee Comments; and

3. Amend rules 36.1 and 36.2

to clarify the meanings of the rules and facilitate their use by practitioners, parties, and court personnel.

The text of the revised and amended rules and related Advisory Committee Comments is attached at pages 12–65.[1]

Rationale for Recommendation

Existing rules governing appeals in noncapital criminal cases and appeals from judgments of death suffer from a variety of stylistic and organizational deficiencies that have accumulated in the appellate rules since they were first adopted six decades ago. The revision undertakes to cure these deficiencies by simplifying the wording of the rules and restructuring them to clarify their meanings and facilitate their use. Most of the changes are stylistic only, but selected substantive changes are necessary to fill unintended gaps and conform older rules to current law; each substantive change is identified and explained in the Advisory Committee Comment to the rule. The principal changes in the rules covered by this revision are discussed in the following report.

To implement the revision it is necessary to amend rules 36.1 and 36.2. These amendments are also discussed in the following report.

Alternative Actions Considered

No alternative to the project as a whole was considered, because nothing short of a complete revision of the appellate rules would have been adequate to the task of curing their many accumulated deficiencies.

Comments From Interested Parties

After reviewing the revised rules and related Advisory Committee Comments, the Rules and Projects Committee authorized their circulation for a 60-day public comment period. A total of 214 comments were received from clerks of reviewing courts and superior courts, judicial staff attorneys, bar associations, and appellate practitioners; in response, the Appellate Advisory Committee further revised many of the rules in the proposal. The principal comments and the committee's responses to each are discussed in the accompanying report, and a chart of all the comments and responses is attached at page 102.

Implementation Requirements and Costs

The clerks' offices of the Supreme Court and the appellate districts will need to review the rules when they are adopted and make necessary adjustments in certain filing, calendaring, and notification procedures. Costs to the Supreme Court, the Courts of Appeal, and the superior courts should otherwise be minimal.

Attachment

[1] Because the revisions to the existing rules were so extensive, it was impracticable to prepare the usual struck-through and underlined rule text showing each specific addition and deletion. Instead, the Appellate Advisory Committee recommends that existing rules 30–36, 37–38, and 39.50–39.57 be repealed in their entirety and replaced by revised rules 30–36 and 36.3 as presented in this proposal. The full text of existing rules 30–36, 37–38, and 39.50–39.57, with strikethrough marks indicating their repeal, is attached at pages 65–101.

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Issue Statement

This is the third installment of the Appellate Advisory Committee's multiyear project to revise the appellate rules of the California Rules of Court. It addresses the rules governing the hearing and decision of appeals in noncapital criminal cases and appeals from judgments of death. The revision is necessary because many provisions of the rules have become unduly complex, difficult to understand, or inconsistent with current law and practice.

Rationale for Recommendation to Adopt Revised Rules 30–36 and 36.3

Existing rules 30–36, 37–38, and 39.50–39.57 suffer in varying degrees from the same deficiencies of language and structure as did former rules 1–18 (revised in the first installment of this project) and 19–29.9 (revised in the second installment of this project), i.e., obscure and ambiguous wording, redundant and obsolete provisions, long and complex sentences and paragraphs, and inconsistencies of style and terminology. To cure these deficiencies, the revision simplifies the wording and clarifies the meaning of each provision; restructures individual rules into subdivisions to promote readability and understanding; and rearranges the order of subdivisions or the rules themselves when logic or clarity dictates. The

[2] The primary revision is of rules 30–36 and 36.3. To implement this revision, however, it is also necessary to amend rules 36.1 and 36.2.

vast majority of the changes are stylistic only; but when necessary and appropriate, the revision also makes selected substantive changes for limited purposes, i.e., to resolve ambiguities; to fill unintended gaps in rule coverage; to conform older rules to current law, practice, and technology; and to otherwise improve the appellate process. Whenever the revision results in a substantive change, the Advisory Committee Comment to the rule identifies and explains the change.

Significant Changes in Revised Rules 30–36 and 36.3

The most significant changes in revised rules 30–36 and 36.3 are summarized and explained as follows:

1. *The rules governing noncapital criminal appeals are self-contained.* Existing rule 30 provides that the rules on civil appeals govern appeals in criminal cases "except where express provision is made to the contrary, or where the application of a particular rule would be clearly impracticable or inappropriate." This rule structure is cumbersome to use and can result in uncertainty about whether a particular civil appeal rule does or does not apply in a criminal appeal. To clarify precisely which rules do apply in criminal cases—and in response to the urging of criminal practitioners—the committee made the criminal rules self-contained. Under this revision courts and practitioners, rather than seeking to infer which civil rules might apply to criminal appeals, will simply consult the criminal rules directly. To avoid undue repetition of provisions that apply to both kinds of cases, however, several of the criminal rules expressly cross-refer to corresponding civil rules.

2. *Separate rules for noncapital criminal appeals and appeals from judgments of death.* Existing rule 39.50 provides that the rules governing noncapital criminal appeals govern appeals from judgments of death "except where otherwise provided by these rules, 39.50 through 39.57." This rule structure, too, is cumbersome to use and can result in uncertainty about whether a particular criminal appeal rule does or does not apply in a death penalty appeal. To clarify precisely which rules do apply in death penalty appeals—and with the full support of practitioners in such cases—the committee also made the death penalty rules self-contained. Thus the revised rules governing criminal and capital cases are divided into two parts: Part VI, Appeals in Noncapital Criminal Cases (rules 30–33.2), and Part VII, Appeals from Judgments of Death (rules 34–36.3). This structure will facilitate use of the rules, because appeals in the two types of criminal cases—noncapital and capital—are in large part handled by different practitioners and heard by different courts. Again to avoid undue repetition of provisions that apply to both kinds of cases, several of the capital rules expressly cross-refer to corresponding criminal rules.

3. *Meaning of "felony case."* Existing rule 31(a) states only that an appeal may be taken in a criminal matter "[i]n the cases provided by law." This wording has furnished inadequate guidance in many instances, especially for unrepresented defendants, and has resulted in criminal appeals' being filed in the wrong court. To clarify which criminal appeals are reviewed in the Courts of Appeal and the Supreme Court, revised rule 30(a) follows the Penal Code by providing that a criminal appeal in a felony case is taken to the Court of Appeal and defining the term "felony case" as thus used. As the committee comment explains at length, however, this is not a substantive change; it follows settled case law unaffected by the recent trial court unification.

4. *Notice of appeal required in appeal after plea of guilty or nolo contendere.* Under existing rule 31(d), in an appeal after a plea of guilty or nolo contendere, the statement required by Penal Code section 1237.5(a) for issuance of a certificate of probable cause serves as a *substitute* for a notice of appeal; under revised rule 30(b)(1), however, the defendant is required to file a notice of appeal *and* that statement. Requiring a notice of appeal in all cases simplifies the rule, permits compliance with the signature requirement of revised rule 30(a)(2), ensures that the defendant's intent to appeal will not be misunderstood, and makes the provision consistent with the rule in civil appeals and with current practice as exemplified in the Judicial Council form governing criminal appeals.

5. *Clerk's duties when there is no certificate of probable cause.* In an appeal after a plea of guilty or nolo contendere, if the defendant does not file the statement required for issuance of a certificate of probable cause or if the superior court denies such a certificate, revised rule 30(b)(3) requires the clerk to mark the notice of appeal "Inoperative" and notify the appellant. The revised rule also requires the clerk to send a copy of the notice of appeal, thus marked, to the appellate project for the district; that entity is charged with the duty of dealing with indigent criminal appeals that suffer from procedural defect, but it can do so efficiently only if it is promptly notified of such cases.

6. *Clerk's duties when the notice of appeal is late*. Existing rule 31(a) requires the clerk to mark the notice of appeal and notify the appellant if the notice is filed late. In a substantive change, revised rule 30.1(c) also requires the clerk to send a copy of a late notice of appeal, marked to show the date it was received but not filed, to the appellate project for the district; again, that entity is charged with the duty of dealing with indigent criminal appeals that suffer from procedural defect, but it can do so efficiently only if it is promptly notified of such cases.

7. *Clerk's duties to prepare index of confidential material.* Existing rule 33.5 requires the clerk to send confidential material filed in the case to the reviewing court in sealed envelopes. Revised rule 31.2(b)(5) fills a gap by requiring the clerk also to prepare and send to the parties an index of any confidential materials sent to the reviewing court, showing the date and the names of all parties present. The purpose of this substantive change is to assist the parties in making—and the court in adjudicating—motions to unseal portions of the record. To protect confidentiality until a record is unsealed, however, the index must endeavor to identify the sealed matter without disclosing its substance. For the same reasons, revised rule 34.1(d) makes an identical change in the rules on death penalty appeals.

8. *Maximum permissible lengths of briefs.* Existing rule 37(d) states in terms of page count the maximum permissible lengths of briefs produced on a computer in criminal appeals and death penalty appeals. Consistently with rule 14(c)(1), revised rules 33(b)(1) (criminal appeals) and 36(b)(1) (death penalty appeals) restate those limits in terms of word count. In addition, rule 14(c)(1) is premised on the assumption that all briefs are double spaced and contain an average of 280 words per page. But rule 14(b)(5) allows briefs to be either double spaced or one-and-one-half spaced, and a page of one-and-one-half spaced text without footnotes contains an average of 340 words. In order not to penalize criminal appellate practitioners who commonly use one-and-one-half spacing in their briefs—and in response to the urging of such practitioners—the committee restated the limits of criminal briefs and death penalty briefs as word counts consistent with one-and-one-half spaced text. The use of such spacing should be encouraged, as it results in cost savings for litigants, reduced demand for shelving space, and environmental benefits.

9. *Declaration that counsel does not intend to request record corrections in death penalty appeals.* Revised rule 34.2(g)(1), like existing rule 39.52(h), requires counsel in a death penalty appeal to file a declaration stating that counsel has performed the tasks required by the rule, i.e., has reviewed the record of preliminary proceedings for completeness and accuracy. But under the existing rule, counsel who is satisfied with the state of the record—and therefore has determined not to request any corrections or additions—simply remains silent in regard to any such request, and the court is required to infer from that silence that counsel does not intend to make a request. In a substantive change designed to prevent any misunderstanding of counsel's intent on this important point, revised rule 34.2(g)(1)(B) requires counsel not intending to request corrections or additions to make a statement to that effect as part of the required declaration. Revised rule 35.1(c)(1)(B) makes an identical change as part of the rule on certifying the trial record for completeness.

10. *Supreme Court to prescribe requirements for computer-readable copies of reporter's transcript.* Existing rule 39.52(i)(6) requires the computer-readable copies of the transcript to comply with former Code of Civil Procedure section 269(c) and existing rule 35(b), and the latter rule specifies that such copies must be on "CD-ROM or 3.5-inch disks." Rather than enshrining any particular technology in these rules, however, revised rule 34.2(i)(2) simply states that computer-readable copies must comply with the statute (now Code Civ. Proc., § 271(b)) and "any additional requirements prescribed by the Supreme Court." The change is not meant to be substantive, but to provide the flexibility necessary to ensure the record-preparation process remains current with evolving computer technology. Revised rules 35.1(e)(2), 35.2(c)(2), and 35.3(b)(2) make identical changes in the rules on certifying the trial record in appeals from judgments of death.

Rationale for Recommendation to Amend Rules 36.1 and 36.2.

Rule 36.1
Rule 12 provides a procedure enabling a reviewing court to order the appellate record to be augmented or corrected. Revised rule 32.1(d) is a cross-reference added to clarify the applicability of rule 12 to noncapital criminal appeals. The proposed amendment to rule 36.1(c) provides the same cross-reference for appeals from judgments of death.

Rule 36.2
Existing rule 36.2(b)(3) provides that in death penalty appeals two counsel may argue on each side if they notify the Supreme Court, not later than 10 days before the date of the argument, that the case requires it. The proposed amendment to rule 36.2(b)(3) requires that the same notice be given within 10 days after the date of the order setting the case for argument. The purpose of the amendment is to coordinate this provision with the provision governing requests to divide oral argument among multiple counsel in noncapital appeals (rule 29.2(f)(2)). In most cases, however, the revised wording will yield a deadline identical to or no later than that resulting from the existing wording, because of the provision requiring the clerk to give the parties at least 20 days' notice of the date of the argument (rule 29.2(c)).

Alternative Actions Considered
No alternative to the project as a whole was considered, because nothing short of a complete revision of the appellate rules would have been adequate to the task of removing the many inconsistent, ambiguous, obsolete, and superfluous provisions that have accumulated in the rules since they were first adopted six decades ago. Nevertheless, a broad range of alternatives was considered for the structure and

wording of each rule, and the committee formulated its proposals only after extensive input from the commentators.

Comments From Interested Parties

After reviewing the revised rules and their related Advisory Committee Comments, the Rules and Projects Committee authorized their circulation for a 60-day public comment period. In response, 214 comments were received from clerks of reviewing courts, superior courts, and their associations; judicial staff attorneys; statewide and local bar associations; and numerous appellate specialists and other practitioners.

Many of the comments expressed strong approval of the reorganization proposed in this installment. Other comments raised concerns about the wording of certain individual rules, and the Appellate Advisory Committee carefully considered such concerns. The proposal was revised in numerous respects in response to the public comments. Summaries of some of the most significant of those comments and the committee's responses follow.[3]

1. Several of the commentators objected to the expanded definition of a "felony case" in revised rule 30(a) on various constitutional, statutory, and practical grounds. The committee disagreed with these objections, and explained why in a detailed response. Its essence is that the change is not in fact substantive: it is settled case law that an appeal is taken to the Court of Appeal not only when the defendant is charged with and convicted of a felony, but also when the defendant is charged with both a felony and a misdemeanor (Pen. Code, § 691(f)) but is convicted of only the misdemeanor; when the defendant is charged with a felony but is convicted of only a lesser offense (Pen. Code, § 1159); and when the defendant is charged with an offense filed as a felony but punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a misdemeanor under Penal Code section 17(b). Nor did trial court unification change this rule: after as before unification, "Appeals in felony cases lie to the [C]ourt of [A]ppeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate."[4]

2. Several of commentators pointed out that, as proposed, revised rule 30(b)(4)—providing that an appeal after a plea of guilty or nolo contendere would not be operative as to any ground for which a certificate of probable cause was denied—was inconsistent with *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1177-1180. The committee agreed and deleted the provision.

[3] A chart of all the comments received and the committee's responses is attached at page 102.
[4] "Recommendation on Trial Court Unification" (July 1998) 28 *Cal. Law Revision Com. Rep.* 455–56.

3. The Appellate Court Committee of the San Diego County Bar Association urged that in revised rule 30(c)(1) the clerk's duty to give notice to counsel, the reviewing court clerk, and the reporters when a notice of appeal is filed should be qualified in "certificate" appeals so that the duty does not arise until the appeal becomes operative by issuance of a certificate of probable cause. This would promote economy because it would permit the clerk to defer giving notice until it is certain the appeal will in fact be allowed to proceed. The committee agreed and added a second sentence so providing to revised rule 30(c)(1).

4. Eric Walden, Supervising Writ Attorney, Court of Appeal, Fifth Appellate District, observed that, as proposed, revised rule 31(b)(14)(A) required the clerk's transcript in a defense appeal to include "the reporter's transcript of any preliminary examination or grand jury hearing." But existing rule 33(a)(1)(*l*) requires the clerk's transcript in such an appeal to include "each written motion made by defendant and denied in whole or in part, with supporting and opposing memoranda and related affidavits, search warrants and returns, and the transcript of any preliminary examination or grand jury hearing related thereto." The commentator asserted that the qualifier "related thereto" refers to the noun phrase at the very beginning of the item—i.e. each written motion by the defendant—and hence that the existing provision means the reporter's transcript must be prepared (and included in the clerk's transcript) only if it is " 'related' to a motion" by the defendant. He concluded that the proposed revised rule unintentionally expanded the provision to require that the preliminary hearing transcript be prepared in every case, which is wasteful. The committee agreed and changed revised rule 31(b)(14) accordingly.

5. The Appellate Courts Committee of the State Bar of California urged that, to facilitate prompt preparation of reporter's transcripts of criminal trials, the reporter should be compelled to "personally participate" in any request to extend time to prepare the transcript. The commentator proposed to do so by amending revised rule 32(e)(2)(A) to require that an application to extend the time to prepare the reporter's transcript be supported by an affidavit of the reporter showing good cause. The committee declined to adopt the suggestion, explaining that the proposed change is beyond the scope of the present rules revision project.

6. Arnella Sims, Los Angeles County Court Reporters Association, observed that there was no provision in revised rule 31.1, as proposed, for notifying the reporter either when the superior court grants an application for additional record and orders additions to the reporter's transcript under subdivision (d)(1) or when the court fails to rule within 5 days and hence the requested material "must be included [in the transcript] without a court order" under subdivision (d)(2). The committee agreed and added new subdivision (d)(3) directing the clerk to notify the reporter when additions to the transcript are required in either instance.

7. Linda Robertson, Supervising Attorney, California Appellate Project, observed that revised rule 31.2(a)(4) allows the Attorney General, simply by filing a written request, to automatically obtain a copy of a sealed *Marsden* transcript if the defendant raises a *Marsden* issue, unless the defendant files a notice that the transcript contains confidential material irrelevant to the appeal. The commentator urged that the rule be changed to require the Attorney General to file a *motion* for such transcript and thus allow the defendant to file an opposition giving reasons why the transcript should not be released, with a judge then exercising discretion to grant or deny the motion. The committee disagreed, explaining that existing rule 33.5(a) includes the same provision and the commentator does not show it is unworkable or unjust in its operation. The proposed change, moreover, is beyond the scope of the present rules revision project.

8. The directors of the appellate projects for the First, Second, Fourth, and Sixth Districts of the Court of Appeal urged that the maximum permissible word count of briefs in criminal appeals prescribed by revised rule 33(b)(1) reflect the fact that rule 14(b)(5) permits briefs to be one-and-one-half spaced. Michael G. Millman, Director of the California Appellate Project, made the same comment with respect to revised rule 36(b)(1), urging that the limits it sets on the lengths of briefs in death penalty appeals likewise reflect word counts consistent with one-and-one-half-spaced text. The committee agreed and calculated the limits accordingly.

9. The committee asked for public comment on whether rule 14(b)(5) should be amended to eliminate the option of one-and-one-half spacing and to require all briefs to be double spaced as in the federal courts. (Fed. Rules App. Proc., rule 32(a)(4).) Three commentators opposed eliminating the option, primarily because to do so would result in briefs' requiring more pages for the same number of words, thus violating "the environmentally-friendly policy expressed throughout the form requirements for transcripts and pleadings in the state rules." The appellate rules manifest this policy in several ways: recycled paper is required for all clerk's and reporter's transcripts and all briefs (rules 9(a)(1)(A), 14(b)(1)) and is recommended for their covers (rules 9(c)(1), 14(b)(10)); reporter's transcripts and briefs may be printed on both sides of the page (rules 9(a)(2), 14(b)(4)) and may be one-and-one-half spaced (rules 9(a)(3), 14(b)(5)). The federal rules, in contrast, do not express a similar environmentally friendly policy: they do not require or even recommend the use of recycled paper; they do not allow the use of both sides of the page; they do not allow one-and-one-half spacing; and they require a minimum font size of 14 points, rather than the 13-point minimum required by the California appellate rules (rule 14(b)(4)). One commentator supported eliminating the option of one-and-one-half spacing because of asserted "reader difficulty"; but that commentator did not address the environmental benefits of producing and storing shorter briefs, and the committee disagreed with

the unsupported claim of reader difficulty. For these reasons the committee concluded not to propose amending rule 14(b)(5) to eliminate the option of one-and-one-half spacing.

10. Judy Pieper, Criminal Courts Coordinator, Superior Court of Los Angeles County, pointed out that, as proposed, revised rule 34.2 encompassed the preparation and certification of the record of all "pretrial proceedings" in death penalty cases, while existing rule 39.52 addresses only those proceedings taking place prior to and including the preliminary examination. The committee agreed and rephrased revised rule 34.2 to limit its applicability to "preliminary proceedings," defined as proceedings held prior to and including the filing of the information or the indictment.

Implementation Requirements and Costs

The clerks' offices of the Supreme Court and all the appellate districts will need to review the body of appellate rules when they are adopted and make necessary adjustments in certain filing and calendaring procedures. Various standard operating procedures and forms used to notify the parties of the steps required to process an appeal will also need to be revised to conform to the new provisions. Costs to the Supreme Court, the Courts of Appeal, and the superior courts should otherwise be minimal.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2004:

1. Repeal existing rules 30–36, 37–38, and 39.50–39.57 of the California Rules of Court;

2. Adopt revised rules 30–36 and 36.3 and related Advisory Committee Comments; and

3. Amend rules 36.1 and 36.2

to clarify the meanings of the rules and facilitate their use by practitioners, parties, and court personnel.

Attachment

Rules 30–36, 37–38, and 39.50–39.57 are repealed; revised rules 30–36.3 are adopted; and rules 36.1 and 36.2 are amended, effective January 1, 2004, to read:

PART VI. Appeals in Noncapital Criminal Cases

Rule 30. Taking the appeal

(a) Notice of appeal

(1) To appeal from a judgment or an appealable order of the superior court in a felony case—other than a judgment imposing a sentence of death—the defendant or the People must file a notice of appeal in that superior court. To appeal after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must also comply with (b).

(2) As used in (1), "felony case" means any criminal action in which a felony is charged, regardless of the outcome. It includes an action in which the defendant is charged with:

(A) a felony and a misdemeanor or infraction, but is convicted of only the misdemeanor or infraction;

(B) a felony, but is convicted of only a lesser offense; or

(C) an offense filed as a felony but punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a misdemeanor under Penal Code section 17(b).

(3) If the defendant appeals, the defendant or the defendant's attorney must sign the notice of appeal. If the People appeal, the attorney for the People must sign the notice.

(4) The notice of appeal must be liberally construed. Except as provided in (b), the notice is sufficient if it identifies the particular judgment or order being appealed. The notice need not specify the court to which the appeal is taken; the appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located.

(b) Appeal after plea of guilty or nolo contendere or after admission of probation violation

(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court—in addition to the notice of appeal required by (a)—the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause.

(2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate.

(3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal "Inoperative," notify the defendant, and send a copy of the marked notice of appeal to the district appellate project.

(4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on:

(A) the denial of a motion to suppress evidence under Penal Code section 1538.5, or

(B) grounds that arose after entry of the plea and do not affect the plea's validity.

(5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).

(c) Notification of the appeal

(1) When a notice of appeal is filed, the superior court clerk must promptly mail a notification of the filing to the attorney of record for each party, to any unrepresented defendant, to the reviewing court clerk, to each court reporter, and to any primary reporter or reporting supervisor. If the defendant also files a statement under (b)(1), the clerk must not mail the notification unless the superior court files a certificate under (b)(2).

(2) The notification must show the date it was mailed, the number and title of the case, and the dates the notice of appeal and any

certificate under (b)(2) were filed. If the information is available, the notification must also include:

(A) the name, address, telephone number, and California State Bar number of each attorney of record in the case;

(B) the name of the party each attorney represented in the superior court; and

(C) the name, address, and telephone number of any unrepresented defendant.

(3) The notification to the reviewing court clerk must also include a copy of the notice of appeal, any certificate filed under (b), and the sequential list of reporters made under rule 980.4.

(4) A copy of the notice of appeal is sufficient notification under (1) if the required information is on the copy or is added by the superior court clerk.

(5) The mailing of a notification under (1) is a sufficient performance of the clerk's duty despite the discharge, disqualification, suspension, disbarment, or death of the attorney.

(6) Failure to comply with any provision of this subdivision does not affect the validity of the notice of appeal.

Advisory Committee Comment (2004)

Subdivision (a). Revised rule 30(a) collects related provisions of former rule 31(a) and (b) and implements certain provisions of the Penal Code.

Penal Code section 1235(b) provides that an appeal from a judgment or appealable order in a "felony case" is taken to the Court of Appeal, and Penal Code section 691(f), defines "felony case" to mean "a criminal action in which a felony is charged . . . ." Revised rule 30(a)(2) makes it clear that a "felony case" is an action in which a felony is charged *regardless of the outcome of the action.* Thus the question whether to file a notice of appeal under this rule or under the rules governing appeals to the appellate division of the superior court (rule 100 et seq.) is answered simply by examining the accusatory pleading: if that document charged the defendant with at least one count of felony (as defined in Pen. Code, § 17(a)), the Court of Appeal has appellate jurisdiction and the appeal must be taken under this rule *even if the prosecution did not result in a punishment of imprisonment in a state prison.*

This is not a substantive change. It is settled case law that an appeal is taken to the Court of Appeal not only when the defendant is charged with and convicted of a felony, but also when the defendant is charged with both a felony and a misdemeanor (Pen. Code, § 691(f)) but is

convicted of only the misdemeanor (e.g., *People v. Brown* (1970) 10 Cal.App.3d 169); when the defendant is charged with a felony but is convicted of only a lesser offense (Pen. Code, § 1159; e.g., *People v. Spreckels* (1954) 125 Cal.App.2d 507); and when the defendant is charged with an offense filed as a felony but punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a misdemeanor under Penal Code section 17(b) (e.g., *People v. Douglas* (1999) 20 Cal.4th 85; *People v. Clark* (1971) 17 Cal.App.3d 890).

Trial court unification did not change this rule: after as before unification, "Appeals in felony cases lie to the [C]ourt of [A]ppeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate. *Cf.* Cal. Const. art. VI, § 11(a) [except in death penalty cases, Courts of Appeal have appellate jurisdiction when superior courts have original jurisdiction 'in causes of a type within the appellate jurisdiction of the [C]ourts of [A]ppeal on June 30, 1995 . . . .']." ("Recommendation on Trial Court Unification" (July 1998) 28 *Cal. Law Revision Com. Rep.* 455–56.)

Subdivision (b). Revised rule 30(b) is former rule 31(d), and governs appeals requiring a certificate of probable cause. Revised rule 30(b)(1) restates the first sentence of former rule 31(d), first paragraph, with two substantive changes. First, the revised subdivision fills a gap by extending the rule to appeals after an admission of probation violation, as provided by statute. (Pen. Code, § 1237.5.)

Second, under the former rule the statement required by Penal Code section 1237.5(a), for issuance of a certificate of probable cause served as a *substitute* for a notice of appeal; under revised rule 30(b)(1), however, the defendant is required to file a notice of appeal *and* that statement. Requiring a notice of appeal in all cases simplifies the rule, permits compliance with the signature requirement of revised rule 30(a)(2), ensures that the defendant's intent to appeal will not be misunderstood, and makes the provision consistent with the rule in civil appeals and with current practice as exemplified in the Judicial Council form governing criminal appeals. The change is substantive.

Revised rule 30(b)(3) fills a gap in the procedure for processing appeals after a plea of guilty or nolo contendere or after an admission of probation violation. In such "certificate" appeals, if the defendant does not file the statement required for issuance of a certificate of probable cause or if the superior court denies such a certificate, revised rule 30(b)(3) requires the clerk to mark the notice of appeal "Inoperative" and notify the appellant. Former rule 30(a) (now revised rule 30.1(d)) similarly required the clerk to mark the notice of appeal and notify the appellant if the notice was filed *late*; revised rule 30(b)(3) thus recognizes an additional ground on which the notice of appeal fails to achieve the appellant's intent. Revised rule 30(b)(3) also requires the clerk to send a copy of the notice of appeal, thus marked, to the appellate project for the district; that entity is charged with the duty, among others, of dealing with indigent criminal appeals that suffer from procedural defect, but it can do so efficiently only if it is promptly notified of such cases. The change is substantive.

Because of the drastic consequences of failure to file the statement required for issuance of a certificate of probable cause in an appeal after a plea of guilty or nolo contendere or after an admission of probation violation, revised rule 30(b)(5) alerts appellants to a relevant rule of case law, i.e., that although such an appeal may be maintained without a certificate of probable cause if the notice of appeal states the appeal is based on the denial of a motion to suppress evidence or on grounds arising after entry of the plea and not affecting its validity (rule 30(b)(4)), no *issue* challenging the validity of the plea is cognizable on that appeal without a certificate of probable cause. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1104.)

Subdivision (c). Revised rule 30(c) collects related provisions of former rule 31(a) and (c).

The third paragraph of former rule 31(a) directed each attorney filing a notice of appeal on a defendant's behalf—or assisting a defendant in filing a notice of appeal—to serve a copy of the notice on "the court reporter, lead reporter, or reporting supervisor." In a substantive change, the first sentence of revised rule 30(c)(1) places this duty instead on the superior court clerk, who is best situated to know the identities of the reporters and who is charged in any event with sending a notification of the filing of the notice of appeal to the reviewing court (together with a copy of the sequential list of reporters under rule 980.4) and to the attorneys for the parties.

The second sentence of revised rule 30(c)(1) is new: it is intended to promote economy by requiring the clerk to defer mailing a notification of the filing of a "certificate" appeal to the parties, the reviewing court, and particularly the reporter, until it is certain the appeal will in fact be allowed to proceed. The change is substantive.

Because a "certificate" appeal is not operative unless and until the superior court files a certificate of probable cause, revised rule 30(c)(2) requires the superior court clerk to include the date of that filing in the notification of the appeal, and revised rule 30(c)(3) requires the clerk to include a copy of the certificate itself in the notification mailed to the reviewing court clerk. Both are substantive changes.

Each provision of revised rule 30(c)(2)(A)–(C), (4), and (5) fills a gap and incorporates wording of revised rule 1(d)(2)(A)–(C), (3), and (4), respectively.

Rule 30.1. Time to appeal

(a) Normal time

Unless otherwise provided by law, a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed.

(b) Premature notice of appeal

A notice of appeal filed before the judgment is rendered or the order is made is premature, but the reviewing court may treat the notice as filed immediately after the rendition of judgment or the making of the order.

(c) Late notice of appeal

The superior court clerk must mark a late notice of appeal "Received [date] but not filed," notify the party that the notice was not filed because it was late, and send a copy of the marked notice of appeal to the district appellate project.

(d) Receipt by mail from custodial institution

If the superior court clerk receives a notice of appeal by mail from a custodial institution after the period specified in (a) has expired but the envelope shows that the notice was mailed or delivered to custodial officials for mailing within the period specified in (a), the notice is deemed timely. The clerk must retain in the case file the envelope in which the notice was received.

Advisory Committee Comment (2004)

Revised rule 30.1 is derived from provisions of former rule 31.

Subdivisions (a)–(c). Subdivisions (a), (b), and (c) of revised rule 30.1 are the first two paragraphs of former rule 31(a). Because revised rule 30(b)(1) requires a defendant wanting to appeal from a judgment after a plea of guilty or nolo contendere to file a notice of appeal as in any other criminal case, the special provision of former rule 31(d) prescribing the time to appeal after such a plea is deleted as unnecessary. In a substantive change, revised rule 30.1(c) also requires the clerk to send a copy of a late notice of appeal, marked with the date it was received but not filed, to the appellate project for the district; that entity is charged with the duty, among others, of dealing with indigent criminal appeals that suffer from procedural defect, but it can do so efficiently only if it is promptly notified of such cases.

Subdivision (d). Revised rule 30.1(d) is former rule 31(e). The subdivision is not intended to limit a defendant's appeal rights under the case law of constructive filing. (See, e.g., *In re Jordan* (1992) 4 Cal.4th 116; *In re Benoit* (1973) 10 Cal.3d 72.)

Rule 30.2. Stay of execution and release on appeal

(a) Application

Pending appeal, the defendant may apply to the reviewing court:

(1) for a stay of execution after a judgment of conviction or an order granting probation; or

(2) for bail, to reduce bail, or for release on other conditions.

(b) Showing

The application must include a showing that the defendant sought relief in the superior court and that the court unjustifiably denied the application.

(c) Service

The application must be served on the district attorney and on the Attorney General.

(d) Interim relief

Pending its ruling on the application, the reviewing court may grant the relief requested. The reviewing court must notify the superior court under rule 56(h) of any stay that it grants.

Advisory Committee Comment (2004)

Revised rule 30.2 is former rule 32.

Subdivision (a). Revised rule 30.2(a)(1) fills a gap by recognizing that a reviewing court may stay execution of an order granting probation pending appeal. (See Pen. Code, § 1243.)

The remedy of an application for bail under revised rule 30.2(a)(2) is separate from but consistent with the statutory remedy of a petition for habeas corpus under Penal Code section 1490. (*In re Brumback* (1956) 46 Cal.2d 810, 815, fn. 3.)

An order of the Court of Appeal denying bail or reduction of bail, or for release on other conditions, is final on filing. (See rule 24(b)(2)(C).)

Subdivision (c). Revised rule 30.2(c) fills a gap by requiring service of an application for stay of execution on the district attorney and the Attorney General.

Subdivision (d). The first sentence of revised rule 30.2(d) recognizes the case law holding that a reviewing court may grant bail or reduce bail, or release the defendant on other conditions, pending its ruling on an application for that relief. (See, e.g., *In re Fishman* (1952) 109 Cal.App.2d 632, 633; *In re Keddy* (1951) 105 Cal.App.2d 215, 217.) The second sentence of the revised subdivision resolves an ambiguity in the former rule by requiring the reviewing court to notify the superior court under rule 56(h) when it grants either (i) a stay to preserve the status quo pending its ruling on a stay application or (ii) the stay requested by that application.

Rule 30.3. Abandoning the appeal

(a) How to abandon

An appellant may abandon the appeal at any time by filing an abandonment of the appeal signed by the appellant or the appellant's attorney of record.

(b) Where to file; effect of filing

(1) If the record has not been filed in the reviewing court, the appellant must file the abandonment in the superior court. The filing effects

a dismissal of the appeal and restores the superior court's jurisdiction.

(2) If the record has been filed in the reviewing court, the appellant must file the abandonment in that court. The reviewing court may dismiss the appeal and direct immediate issuance of the remittitur.

(c) Clerk's duties

(1) The clerk of the court in which the appellant files the abandonment must immediately notify the adverse party of the filing or of the order of dismissal. If the defendant abandons the appeal, the clerk must notify both the district attorney and the Attorney General.

(2) If the appellant files the abandonment in the superior court, the clerk must immediately notify the reviewing court.

(3) The clerk must immediately notify the reporter if the appeal is abandoned before the reporter has filed the transcript.

Advisory Committee Comment (2004)

Revised rule 30.3 is former rule 38.

Subdivision (a). The former rule provided that an appellant may *dismiss* an appeal by filing an *abandonment* of it; revised rule 30.3(a) provides instead that an appellant may *abandon* an appeal by filing such an abandonment. The change is not substantive, and is intended to simplify the rule and to clarify its operation by reserving the term "dismiss" for the discretionary act of a reviewing court in response to an abandonment filed in that court (see revised subd. (b)(2)).

Subdivision (c). Paragraphs (2) and (3) of revised rule 30.3(c) fill gaps in the former rule and are substantive changes.

Rule 31. Normal record

(a) Contents

If the defendant appeals from a judgment of conviction, or if the People appeal from an order granting a new trial, the record must contain a clerk's transcript and a reporter's transcript, which together constitute the normal record.

(b) Clerk's transcript

The clerk's transcript must contain:

(1) the accusatory pleading and any amendment;

(2) any demurrer or other plea;

(3) all court minutes;

(4) all instructions submitted in writing, each one indicating the party requesting it;

(5) any written communication between the court and the jury or any individual juror;

(6) any verdict;

(7) any written opinion of the court;

(8) the judgment or order appealed from and any abstract of judgment or commitment;

(9) any motion for new trial, with supporting and opposing memoranda and attachments;

(10) the notice of appeal and any certificate of probable cause filed under rule 30(b);

(11) any transcript of a sound or sound-and-video recording furnished to the jury or tendered to the court under rule 203.5;

(12) any application for additional record and any order on the application;

(13) if the appellant is the defendant, the clerk's transcript must also contain:

(A) any written defense motion denied in whole or in part, with supporting and opposing memoranda and attachments;

(B) if related to a motion under (A), any search warrant and return and the reporter's transcript of any preliminary examination or grand jury hearing;

(C) any certified record of a court or the Department of Corrections admitted in evidence to prove a prior conviction or prison term; and

(D) the probation officer's report.

(c) Reporter's transcript

The reporter's transcript must contain:

(1) the oral proceedings on the entry of any plea other than a not guilty plea;

(2) the oral proceedings on any motion in limine;

(3) the oral proceedings at trial, but excluding the voir dire examination of jurors and any opening statement;

(4) all instructions given orally;

(5) any oral communication between the court and the jury or any individual juror;

(6) any oral opinion of the court;

(7) the oral proceedings on any motion for new trial;

(8) the oral proceedings at sentencing, granting or denial of probation, or other dispositional hearing;

(9) if the appellant is the defendant, the reporter's transcript must also contain:

(A) the oral proceedings on any motion under Penal Code section 1538.5 denied in whole or in part;

(B) the closing arguments; and

(C) any comment on the evidence by the court to the jury.

(d) Limited normal record in certain appeals

If the People appeal from a judgment on a demurrer to the accusatory pleading, or if the defendant or the People appeal from an appealable order other than a ruling on a motion for new trial, the normal record is composed of a reporter's transcript of any oral proceedings incident to the judgment or order being appealed and a clerk's transcript containing:

(1) the accusatory pleading and any amendment;

(2) any demurrer or other plea;

(3) any motion or notice of motion granted or denied by the order appealed from, with supporting and opposing memoranda and attachments;

(4) the judgment or order appealed from and any abstract of judgment or commitment;

(5) any court minutes relating to the judgment or order appealed from; and

(6) the notice of appeal.

(e) Exhibits

Exhibits admitted in evidence, refused, or lodged are deemed part of the record, but may be transmitted to the reviewing court only as provided in rule 18.

(f) Stipulation for partial transcript

If counsel for the defendant and the People stipulate in writing before the record is certified that any part of the record is not required for proper determination of the appeal, that part must not be prepared or sent to the reviewing court.

(g) Form of record

The clerk's and reporter's transcripts must comply with rule 9.

Advisory Committee Comment (2004)

Revised rule 31 combines former rules 33(a), 34, and 35(f).

Subdivision (c). Former rule 33(a)(2) provided that oral communications between the court and the jury after the giving of the instructions were included in the normal reporter's transcript only in an appeal by the defendant; revised rule 31(c)(5) extends that provision generally to an appeal by either party. Written communications between the court and the jury are included in the normal clerk's transcript in an appeal by either party (see revised subd. (b)(5)), and no reason appears to perpetuate the distinction.

Subdivision (d). Revised rule 31(d) is former rule 34.

Subdivision (e). Revised rule 31(e) supersedes scattered and incomplete provisions on exhibits previously found in former rules 33(a)(3), 33(b)(3), 34(3), and 35(e). The revised rule incorporates by reference rule 18, which contains substantive changes that are explained in the comment to that rule.

Subdivision (f). Revised rule 31(f) is former rule 35(f).

Rule 31.1. Application in superior court for addition to normal record

(a) Appeal by the People

The People, as appellant, may apply to the superior court for inclusion in the record of any item that would be part of the normal record in a defendant's appeal.

(b) Application by either party

Either the People or the defendant may apply to the superior court for inclusion in the record of any of the following items:

(1) in the clerk's transcript: any defense motion granted in whole or in part or any motion by the People, with supporting and opposing memoranda and attachments;

(2) in the reporter's transcript:

(A) the voir dire examination of jurors;

(B) any opening statement; and

(C) the oral proceedings on motions other than those listed in rule 31(c).

(c) Application

(1) An application for additional record must describe the material to be included and explain how it may be useful in the appeal.

(2) The application must be filed in the superior court with the notice of appeal or as soon thereafter as possible, and will be treated as denied if it is filed after the record is sent to the reviewing court.

(3) The clerk must immediately present the application to the trial judge.

(d) Order

(1) Within five days after the application is filed, the judge must order that the record include as much of the additional material as the judge finds proper to fully present the points raised by the applicant. Denial of the application does not preclude a motion in the reviewing court for augmentation under rule 12.

(2) If the judge does not rule on the application within the time prescribed by (1), the requested material—other than exhibits—must be included in the clerk's transcript or the reporter's transcript without a court order.

(3) The clerk must immediately notify the reporter if additions to the reporter's transcript are required under (1) or (2).

Advisory Committee Comment (2004)

Revised rule 31.1 is former rule 33(b).

Subdivision (b). Former rule 33(b) described the application for additional record as both an "application" and a "request" for an order. For internal consistency and consistency with the style of these rules, revised rule 31.1 uses only the term "application." The change is not substantive.

Former rule 33(b)(3) provided for the transmission to the reviewing court of exhibits not requested by that court. Revised rule 31.1(e) now governs the transmission of exhibits.

Subdivisions (c) and (d). Former rule 33(b) required the clerk, when a request for additional record was filed, to *immediately* present it to the judge "and notify the reporter." But because the reporter had no duty to prepare any additional transcript unless the judge granted the request or failed to act on it within five days, the notification was premature. In a substantive change, subdivision (c)(3) of revised rule 31.1 deletes the requirement of immediate notification, and subdivision (d)(3) instead directs the clerk to notify the reporter when and if additions to the transcript are needed.

Rule 31.2. Sealed records

(a) *Marsden* hearing

(1) The reporter's transcript of any hearing held under *People v. Marsden* (1970) 2 Cal.3d 118 must be sealed. The chronological index to the reporter's transcript must include the *Marsden* hearing but list it as "SEALED" or the equivalent.

(2) The superior court clerk must send the original and one copy of the sealed transcript to the reviewing court with the record.

(3) The superior court clerk must send one copy of the sealed transcript to the defendant's appellate counsel or, if appellate counsel has not yet been retained or appointed, to the appellate project for the district.

(4) If the defendant raises a *Marsden* issue in the opening brief, the reviewing court clerk must send a copy of the sealed transcript to the People on written application, unless the defendant has served and filed with the brief a notice that the transcript contains confidential material not relevant to the issues on appeal.

(5) If the defendant serves and files a notice under (4), the People may move to obtain a copy of any relevant portion of the sealed transcript.

(b) Other in-camera proceedings

(1) Any party may apply to the superior court for an order that the record include:

(A) a sealed, separately paginated reporter's transcript of any in-camera proceeding at which a party was not allowed to be represented; and

(B) any item that the trial court withheld from a party on the ground that it was confidential.

(2) The application and any ruling under (1) must comply with rule 31.1.

(3) If the court grants the application, it may order the reporter who attended the in-camera proceeding to personally prepare the transcript. The chronological index to the reporter's transcript must include the proceeding but list it as "SEALED" or the equivalent.

(4) The superior court clerk must send the transcript of the in-camera proceeding or the confidential item to the reviewing court in a sealed envelope labeled "CONFIDENTIAL—MAY NOT BE EXAMINED WITHOUT COURT ORDER." The reviewing court clerk must file the envelope and store it separately from the remainder of the record.

(5) The superior court clerk must prepare an index of any material sent to the reviewing court under (4), showing the date and the names of all parties present at each proceeding, but not disclosing the substance of the sealed matter, and send the index:

(A) to the People, and

(B) to the defendant's appellate counsel or, if appellate counsel has not yet been retained or appointed, to the appellate project for the district.

(6) Unless the reviewing court orders otherwise, material sealed under (4) may be examined only by a reviewing court justice personally; but parties and their attorneys who had access to the material in the trial court may also examine it.

(c) Omissions

If at any time the superior court clerk or the reporter learns that the record omits material that any rule requires included and that this rule requires sealed:

(1) the clerk and the reporter must comply with rule 32.1(b), and

(2) the clerk must comply with the provisions of this rule requiring sealing and prescribing which party's counsel, if any, must receive a copy of sealed material.

Advisory Committee Comment (2004)

Revised rule 31.2 is former rule 33.5.

Subdivision (a). Former rule 33.5(a) required the superior court clerk to send the defendant's copy of a sealed *Marsden* transcript to the reviewing court and required the reviewing court clerk to forward that copy to the defendant's appellate counsel; the latter act was not discretionary. In a substantive change intended to simplify the process and promote efficiency, revised rule 31.2(a)(3) requires the superior court clerk to send the defendant's copy directly to the defendant's appellate counsel.

Former rule 33.5(a) also required the reviewing court clerk, in cases in which the defendant's appellate counsel had not been retained or appointed when the *Marsden* transcript reached the reviewing court, to retain custody of the transcript and send it to such counsel only "when he or she has appeared in the cause." But because most criminal defendants request appointment of appellate counsel and the appellate projects are charged with recommending those appointments to the reviewing courts, it is the practice of reviewing court clerks to send *Marsden* transcripts directly to the appellate projects on receiving them, rather than retaining them until counsel are appointed. Revised rule 31.2(a)(3)(B) incorporates this practice; the change is substantive.

Subdivision (b). Former rule 33.5(b) authorized a party to seek an order adding confidential materials to the record by means of a "request" to the court. For consistency with the style of these rules, revised rule 31.2(b) substitutes the term "application." The change is not substantive.

Former rule 33.5(b)(2) authorized adding confidential "written materials" to the record; filling a gap, revised rule 31.2(b)(1)(B) substitutes the broader phrase "any item" in order to include such nonwritten materials as photographic exhibits.

Revised rule 31.2(b)(5) fills a gap by requiring the clerk to prepare and send to the parties an index of any confidential materials sent to the reviewing court, showing the date and the names of all parties present. The purpose of this substantive change is to assist the parties in making—and the court in adjudicating—motions to unseal portions of the record. To protect confidentiality until a record is unsealed, however, the index must endeavor to identify the sealed matter without disclosing its substance.

Rule 31.3. Juror-identifying information

(a) Applicability

A clerk's transcript, a reporter's transcript, or any other document in the record that contains juror-identifying information must comply with this rule.

(b) Juror names, addresses, and telephone numbers

(1) The name of each trial juror or alternate sworn to hear the case must be replaced with an identifying number wherever it appears in any document. The superior court clerk must prepare and keep under seal in the case file a table correlating the jurors' names with their identifying numbers. The clerk and the reporter must use the table in preparing all transcripts or other documents.

(2) The addresses and telephone numbers of trial jurors and alternates sworn to hear the case must be deleted from all documents.

(c) Potential jurors

Information identifying potential jurors called but not sworn as trial jurors or alternates must not be sealed unless otherwise ordered under Code of Civil Procedure section 237(a)(1).

Advisory Committee Comment (2004)

Revised rule 31.3 is former rule 33.6. The rule implements Code of Civil Procedure section 237.

Rule 32. Preparing, certifying, and sending the record

(a) Immediate preparation when appeal is likely

(1) The reporter and the clerk must begin preparing the record immediately after a verdict or finding of guilt of a felony is announced following a trial on the merits, unless the judge determines that an appeal is unlikely under (2).

(2) In determining the likelihood of an appeal, the judge must consider the facts of the case and the fact that an appeal is likely if the defendant has been convicted of a crime for which probation is prohibited or is prohibited except in unusual cases, or if the trial involved a contested question of law important to the outcome.

(3) A determination under (2) is an administrative decision intended to further the efficient operation of the court and not intended to affect any substantive or procedural right of the defendant or the People. The determination cannot be cited to prove or disprove any legal or factual issue in the case and is not reviewable by appeal or writ.

(b) Appeal after plea of guilty or nolo contendere or after admission of probation violation

In an appeal under rule 30(b)(1), the time to prepare, certify, and file the record begins when the court files a certificate of probable cause under rule 30(b)(2).

(c) Clerk's transcript

(1) Except as provided in (a) or (b), the clerk must begin preparing the clerk's transcript immediately after the notice of appeal is filed.

(2) Within 20 days after the notice of appeal is filed, the clerk must complete preparation of an original and two copies of the clerk's transcript.

(3) On request, the clerk must prepare an extra copy for the district attorney.

(4) If there is more than one appealing defendant, the clerk must prepare an extra copy for each additional appealing defendant represented by separate counsel.

(5) The clerk must certify as correct the original and all copies of the clerk's transcript.

(d) Reporter's transcript

(1) Except as provided in (a) or (b), the reporter must begin preparing the reporter's transcript immediately on being notified by the clerk under rule 30(c)(1) that the notice of appeal has been filed.

(2) The reporter must prepare an original and the same number of copies of the reporter's transcript as (c) requires of the clerk's transcript, and must certify each as correct.

(3) The reporter must deliver the original and all copies to the superior court clerk as soon as they are certified, but no later than 20 days after the notice of appeal is filed.

(4) Any portion of the transcript transcribed during trial must not be retyped unless necessary to correct errors, but must be repaginated and bound with any portion of the transcript not previously

transcribed. Any additional copies needed must not be retyped but must be prepared by photocopying or an equivalent process.

(5) In a multireporter case, the clerk must accept any completed portion of the transcript from the primary reporter one week after the time prescribed by (3) even if other portions are uncompleted. The clerk must promptly pay each reporter who certifies that all portions of the transcript assigned to that reporter are completed.

(e) Extension of time

(1) The superior court may not extend the time for preparing the record.

(2) The reviewing court may order one or more extensions of time for preparing the record, not exceeding a total of 60 days, on receipt of:

(A) an affidavit showing good cause, and

(B) in the case of a reporter's transcript, certification by the superior court presiding judge, or a court administrator designated by the presiding judge, that an extension is reasonable and necessary in light of the workload of all reporters in the court.

(f) Sending the transcripts

(1) When the clerk's and reporter's transcripts are certified as correct, the clerk must promptly send:

(A) the original transcripts to the reviewing court, noting the sending date on each original;

(B) one copy of each transcript to each defendant's appellate counsel and to the Attorney General; and

(C) one copy of each transcript to the district attorney if requested under (c)(3).

(2) If the defendant's appellate counsel has not been retained or appointed when the transcripts are certified as correct, the clerk

must send that counsel's copy of the transcripts to the district appellate project.

(g) Probation officer's report

The probation officer's report included in the clerk's transcript under rule 31(b) must appear in all copies of the appellate record. The reviewing court's copy of the report must be placed in a sealed envelope marked "Confidential—May Not Be Examined Without Court Order—Probation Officer Report."

(h) Supervision of preparation of record

Each Court of Appeal clerk, under the supervision of the administrative presiding justice or the presiding justice, must take all appropriate steps to ensure that superior court clerks and reporters promptly perform their duties under this rule. This provision does not affect the superior courts' responsibility for the prompt preparation of appellate records.

Advisory Committee Comment (2004)

Subdivision (a). Revised rule 32(a) is former rule 34.5, implementing Code of Civil Procedure section 269(b). Like the former rule, revised rule 32(a)(2) provides brief guidelines to assist the trial judge in deciding whether an appeal in the case is likely or unlikely. The former rule set forth three additional guidelines for the same purpose; but because two of these are plainly implied by the remainder of the rule and the third is not actually a guideline but a statistic, all three are deleted from revised rule 32(a).

Subdivision (b). Revised rule 32(b) restates the third paragraph of former rule 31(d).

Subdivision (c). Revised rule 32(c) is derived from former rule 35(a). Former rule 35(a) generally provided that extensions of time to prepare the clerk's transcript were governed by rule 45(c), but former rule 35(d) specifically provided a different procedure for extending any record-preparation time prescribed by the rule. The revised rule removes this inconsistency by providing that extensions of time to prepare the clerk's transcript, like extensions for the reporter's transcript, are governed by subdivision (e).

In a case with more than one appealing defendant, the former rule directed the clerk to prepare an extra copy of the clerk's transcript for each extra defendant; but the rule limited the number of those copies to two regardless of the number of additional defendants, unless one or more of the defendants was sentenced to death. The revised rule deletes that limit in order to conform to current practice, in which a copy of the transcript is typically prepared for each additional appealing defendant represented by separate counsel.

Subdivision (d). Revised rule 32(d) is primarily derived from former rule 35(b). The revised rule deletes the provision of the former rule that required the clerk to deliver the notification of the filing of the notice of appeal to the reporter "personally or to his or her office

or internal mail receptacle" and authorized the clerk to mail the notification if the reporter was not a court employee; the provision was unnecessary micromanagement of the clerk's office. (For the same reason, revised rule 4 deletes the same provision from the civil appellate rules.)

Paragraphs (3) and (5) of former rule 35(c) contained overlapping and inconsistent provisions directing that copies of the record be shared in various ways if there were four or more appealing defendants. Because revised rule 32(c)(4) and (d)(2) require that a copy of each transcript be prepared for each additional appealing defendant represented by separate counsel, the former provisions for sharing copies are deleted as obsolete.

Subdivision (f). Revised rule 32(f) is derived from former rule 35(c) and (e). Former rule 35(e) purported to require that the district attorney send to the clerk any copy of the transcript that the clerk had previously sent to the district attorney at the latter's request (former rule 35(a), revised rule 32(c)(2)), and that the clerk then send that copy to the Attorney General. Revised rule 32(f) deletes that requirement for several reasons: it is inconsistent with the purpose of revised subdivision (c)(3), it is unnecessary because the Attorney General's Office receives its own copy of the transcript under revised subdivision (f)(1) (former rule 35(c)), and it does not conform to actual practice.

Revised rule 32(f)(2) fills a gap and reflects current practice (see also revised rule 31.2(a)(3)(B)).

Former rule 35(e). Former rule 35(e) provided for the transmission of certain exhibits to the reviewing court. Revised rule 31(e) now governs all matters relating to the transmission of exhibits.

Former rule 35(f). Former rule 35(f) has been moved to revised rule 31(f).

Rule 32.1. Augmenting or correcting the record in the Court of Appeal

(a) Subsequent trial court orders

If, after the record is certified, the trial court amends or recalls the judgment or makes any other order in the case, including an order affecting the sentence or probation, the clerk must promptly certify and send a copy of the amended abstract of judgment or other order—as an augmentation of the record—to the reviewing court, the probation officer, the defendant, the defendant's appellate counsel, and the Attorney General.

(b) Omissions

If, after the record is certified, the superior court clerk or the reporter learns that the record omits a document or transcript that any rule or order requires included, the clerk must promptly copy and certify the document or the reporter must promptly prepare and certify the transcript. Without the need for a court order, the clerk must promptly send the document or transcript—

as an augmentation of the record—to the reviewing court, the defendant's appellate counsel, and the Attorney General.

(c) Defendant's appellate counsel not yet retained or appointed

If the defendant's appellate counsel has not yet been retained or appointed, the clerk must send to the district appellate project any document or transcript added to the record under (a) or (b).

(d) Augmentation or correction by the reviewing court

At any time, on motion of a party or on its own motion, the reviewing court may order the record augmented or corrected as provided in rule 12.

Advisory Committee Comment (2004)

Subdivision (a). Revised rule 32.1(a) combines related provisions of the first sentence of former rule 33(d) and the last paragraph of former rule 35(e).

Subdivision (b). Revised rule 32.1(b) is the third paragraph of former rule 35(e). The words "or order" inserted in the first sentence are intended to refer to any court order to include additional material in the record, e.g., an order of the superior court pursuant to revised rule 31.1(d)(1).

Subdivision (c). Revised rule 32.1(c) restates the second sentence of former rule 33(d), modified to conform to current practice (see also revised rule 31.2(a)(3)(B)).

Subdivision (d). Revised rule 32.1(d) is new. It is not a substantive change, but is a cross-reference inserted in this rule to clarify the applicability of rule 12 to criminal appeals.

Rule 32.2. Agreed statement

If the parties present the appeal on an agreed statement, they must comply with the relevant provisions of rule 6, but the appellant must file an original and three copies of the statement in superior court within 25 days after filing the notice of appeal.

Advisory Committee Comment (2004)

Revised rule 32.2 is former rule 36(a).

Rule 32.3. Settled statement

(a) Application

As soon as a party learns that any portion of the oral proceedings cannot be transcribed, the party may serve and file in superior court an application for permission to prepare a settled statement. The application must explain why the oral proceedings cannot be transcribed.

(b) Order and proposed statement

The judge must rule on the application within five days after it is filed. If the judge grants the application, the parties must comply with the relevant provisions of rule 7, but the applicant must deliver a proposed statement to the judge for settlement within 30 days after it is ordered, unless the reviewing court extends the time.

(c) Serving and filing the settled statement

The applicant must prepare, serve, and file in superior court an original and three copies of the settled statement.

Advisory Committee Comment (2004)

Revised rule 32.3 is based on former rule 36(b).

Subdivision (a). Former rule 36(b) authorized only appellants to apply for permission to prepare a settled statement when a portion of the oral proceedings could not be transcribed. In a substantive change, revised rule 32.3(a) expands this authority to include any party: no reason appears to deny respondents the opportunity to seek such relief.

Revised rule 32.3(a) also deletes as unnecessary formalisms the former requirements that the application be "verified" and include, as an alternative to a statement of the facts, a "certificate" of the clerk showing that a reporter's transcript cannot be obtained; under the revised rule, the application must simply "explain why the oral proceedings cannot be transcribed." The sufficiency of that explanation is for the court to decide. The change is substantive.

Rule 33. Briefs

(a) Contents and form

Except as provided in this rule, briefs in criminal appeals must comply as nearly as possible with rules 13 and 14.

(b) Length

(1) A brief produced on a computer must not exceed 25,500 words, including footnotes. Such a brief must include a certificate by appellate counsel or an unrepresented defendant stating the number of words in the brief; the person certifying may rely on the word count of the computer program used to prepare the brief.

(2) A typewritten brief must not exceed 75 pages.

(3) The tables, a certificate under (1), and any attachment permitted under rule 14(d) are excluded from the limits stated in (1) or (2).

(4) A combined brief in an appeal governed by (e) must not exceed double the limit stated in (1) or (2).

(5) On application, the presiding justice may permit a longer brief for good cause.

(c) Time to file

(1) The appellant's opening brief must be served and filed within 40 days after the record is filed in the reviewing court.

(2) The respondent's brief must be served and filed within 30 days after the appellant's opening brief is filed.

(3) The appellant must serve and file a reply brief, if any, within 20 days after the respondent files its brief.

(4) The time to serve and file a brief may not be extended by stipulation, but only by order of the presiding justice under rule 45.

(5) Rule 17 applies if a party fails to timely file an appellant's opening brief or a respondent's brief, but the period specified in the notice required by that rule must be 30 days.

(d) Service

(1) Defendant's appellate counsel must serve each brief for the defendant on the People and the district attorney, and must send a copy of each to the defendant personally unless the defendant requests otherwise.

(2) The proof of service under (1) must state that a copy of the defendant's brief was sent to the defendant, or counsel must file a signed statement that the defendant requested in writing that no copy be sent.

(3) For each appealing defendant, the People must serve two copies of their briefs on the defendant's appellate counsel and one copy on the district appellate project.

(4) A copy of each brief must be served on the superior court clerk for delivery to the trial judge.

(e) When a defendant and the People appeal

When both a defendant and the People appeal, the defendant must file the first opening brief unless the reviewing court orders otherwise, and rule 16(b) governs the contents of the briefs.

(f) Amicus curiae briefs

Amicus curiae briefs may be filed as provided in rule 13(c).

Advisory Committee Comment (2004)

Revised rule 33 is based on former rule 37.

Subdivision (b). Revised rule 33(b)(1) states the maximum permissible length of a brief produced on a computer in terms of word count rather than page count. This substantive change tracks a provision in revised rule 14(c) governing Court of Appeal briefs, and is explained in the comment to that provision. The word count assumes a brief using one-and-one-half spaced lines of text, as permitted by rule 14(b)(5).

The maximum permissible length of briefs in death penalty appeals is prescribed in revised rule 36.

Subdivision (c). For completeness, revised rule 33(c)(4) adds a cross-reference to the general provision of rule 45 allowing extensions of time to file briefs by order of the presiding justice. The provision tracks an identical provision in the rule governing briefs on the merits in the Supreme Court (rule 29.1(a)(5)).

Subdivision (d). Revised rule 33(d)(3) requires the People to serve one copy of their briefs on the appellate project for the district and an extra copy for each additional appealing defendant. This is a substantive change but reflects common practice.

Subdivision (e). Revised rule 33(e) fills a gap by providing for cases in which both a defendant and the People appeal. It is derived from rule 16, adapted to criminal appeals.

Subdivision (f). Revised rule 33(f) is a cross-reference provision added to clarify the applicability of rule 13(c) to criminal appeals.

Rule 33.1. Hearing and decision in the Court of Appeal

Rules 21 through 27 govern the hearing and decision in the Court of Appeal of an appeal in a criminal case.

Advisory Committee Comment (2004)

Revised rule 33.1 is new but is not a substantive change. It clarifies the applicability, to noncapital criminal appeals, of the relevant rules governing the hearing and decision of civil appeals in the Court of Appeal.

Rule 33.2. Hearing and decision in the Supreme Court

Rules 28 through 29.9 govern the hearing and decision in the Supreme Court of an appeal in a criminal case.

Advisory Committee Comment (2004)

Revised rule 33.2 is new but is not substantive change. It clarifies the applicability, to noncapital criminal appeals, of the rules governing the hearing and decision of civil appeals in the Supreme Court.

PART VII. Appeals from Judgments of Death

Rule 34. In general

(a) Automatic appeal to Supreme Court

If a judgment imposes a sentence of death, an appeal by the defendant is automatically taken to the Supreme Court.

(b) Copies of judgment

When a judgment of death is rendered, the superior court clerk must immediately send certified copies of the commitment to the Supreme Court, the Attorney General, the Governor, and the California Appellate Project in San Francisco.

(c) Extensions of time

When a rule in this part authorizes a trial court to grant an extension of a specified time period, the court must consider the relevant policies and factors stated in rule 45.5.

(d) Supervising preparation of record

The Supreme Court clerk, under the supervision of the Chief Justice, must take all appropriate steps to ensure that superior court clerks and reporters promptly perform their duties under the rules in this part. This provision does not affect the superior courts' responsibility for the prompt preparation of appellate records in capital cases.

(e) Definitions

For purposes of this part:

(1) the delivery date of a transcript sent by mail is the mailing date plus five days, and

(2) "trial counsel" means both the defendant's trial counsel and the prosecuting attorney.

Advisory Committee Comment (2004)

Revised rule 34 restates former rule 39.50 and related provisions of the Penal Code.

Subdivision (a). Revised rule 34(a) is derived from Penal Code section 1239(b).

Subdivision (b). Revised rule 34(b) is derived from Penal Code sections 1217 and 1218 and former rule 39.50(e). Filling a gap, the revised rule requires the clerk to send a certified copy of the commitment to the California Appellate Project in San Francisco. That entity also receives copies of the record when it is certified as complete (revised rule 35.1(g)(2)) and when it is certified as accurate (revised rule 35.2(e)(2)).

Subdivision (c). In determining whether to grant an extension of time under these rules, former rule 39.50(d) made it permissible for a trial court to consider the relevant policies and factors listed in rule 45.5. But rule 45.5 *requires* the Supreme Court and the Court of Appeal to consider those same policies and factors (rule 45.5(c)), and no reason appears for a different rule in the case of the trial courts. Moreover, the list of such factors in rule 45.5 is so comprehensive that it is difficult to conceive of a factor that a trial court could properly consider that is not found in that rule. (See, e.g., rule 45.5(c)(9) ["Any other factor which in the context of a particular case constitutes good cause"].) In a substantive change, revised rule 34(c) therefore provides that in determining whether to grant an extension, a trial court *must* consider the relevant policies and factors stated in rule 45.5.

The "relevant" policies and factors that the trial court must consider are those which are relevant to appeals from judgments of death. One of those factors is particularly relevant to such appeals, i.e., "[t]he number and complexity of the issues raised . . . and the length of the record, . . . including the number of relevant trial exhibits." (Rule 45.5(c)(3).) The "average-length record" described in the second sentence of rule 45.5(c)(3), however, refers to records in civil and noncapital criminal cases; the average-length record in capital cases is much longer.

Subdivision (d). Revised rule 34(d) is former rule 35(h).

Subdivision (e). Revised rule 34(e)(2) restates Penal Code section 190.8(i).

Former subdivision (b). Subdivision (b) of former rule 39.50—which provided that the rules in this part must be "interpreted to effectuate the intent of the Legislature, as stated in Penal Code section 190.8"—is deleted as unnecessary: any rule of court that implements a statute must be construed to effectuate the intent of that statute.

Rule 34.1. Contents and form of the record

(a) Contents of the record

(1) The record must include a clerk's transcript containing:

(A) all items listed in rule 31(b), except item (10);

(B) all items listed in rule 31.1(b)(1), whether or not requested; and

(C) any other document filed or lodged in the case, including each juror questionnaire, whether or not the juror was selected.

(2) The record must include a reporter's transcript containing:

(A) all items listed in rule 31(c);

(B) all items listed in rule 31.1(b)(2), whether or not requested; and

(C) any other oral proceedings in the case, including any proceedings that did not result in a verdict or sentence of death because the court ordered a mistrial or a new trial.

(3) All exhibits admitted in evidence, refused, or lodged are deemed part of the record, but may be transmitted to the reviewing court only as provided in rule 36.1.

(4) The superior court or the Supreme Court may order that the record include additional material.

(b) Confidential records

(1) All documents filed or lodged confidentially under Penal Code section 987.9 or 987.2 must be sealed. Documents filed or lodged under Penal Code section 987.9 must be bound separately from documents filed under Penal Code section 987.2. Unless otherwise ordered, copies must be provided only to the Supreme Court and to counsel for the defendant to whom the documents relate.

(2) All reporter's transcripts of in camera proceedings must be sealed. Unless otherwise ordered, copies must be provided only to the Supreme Court and to counsel for parties present at the proceedings.

(3) Records sealed under this rule must comply with rule 31.2.

(c) Juror-identifying information

Any document in the record containing juror-identifying information must be edited in compliance with rule 31.3. Unedited copies of all such documents and a copy of the table required by the rule, under seal and bound together, must be included in the record sent to the Supreme Court.

(d) Form of record

The clerk's transcript and the reporter's transcript must comply with rule 9, but the indexes for the clerk's transcript must separately list all sealed documents in that transcript, and the indexes for the reporter's transcript must separately list all sealed reporter's transcripts with the date and the names of all parties present. The indexes must not disclose the substance of any sealed matter.

Advisory Committee Comment (2004)

Subdivision (a). Subdivision (a) of revised rule 34.1 restates Penal Code section

190.7(a) and former rule 39.51(a) and (c).

Subdivision (b). Under the third sentence of revised rule 34.1(b)(1), copies of sealed documents must be given only to the Supreme Court and to the defendant concerned "[u]nless otherwise ordered." The qualification is added in recognition of the statutory right of the Attorney General to request, under certain circumstances, copies of documents filed confidentially under Penal Code section 987.9(d). To facilitate compliance with such requests, the second sentence of revised rule 34.1(b)(1) requires such documents to be bound separately from documents filed confidentially under Penal Code section 987.2.

Paragraph (3) of revised rule 34.1(b) implements the purpose of the subdivision by requiring compliance with revised rule 31.2 in capital cases.

Subdivision (c). The first sentence of revised rule 34.1(c) fills a gap by requiring compliance with revised rule 31.3 in capital cases, i.e., by requiring the editing of all documents in the record to delete any juror-identifying information. The second sentence restates paragraph (3) of former rule 33.6.

Subdivision (d). Revised rule 34.1(d) moves to a more appropriate location provisions of former rule 39.53(b)(1) and (3) requiring that the clerk's and reporter's transcripts comply with rule 9.

Revised rule 34.1(d) fills a gap by requiring that the master indexes of the clerk's and reporter's transcripts separately list all documents and transcripts each contains that were filed in sealed form under subdivision (b). The purpose of this substantive change is to assist the parties in making—and the court in adjudicating—motions to unseal portions of the record. To protect confidentiality until a record is unsealed, however, each index must endeavor to identify the sealed matter it lists without disclosing its substance.

Rule 34.2. Preparing and certifying the record of preliminary proceedings

(a) Definitions

For purposes of this rule:

(1) the "preliminary proceedings" are all proceedings held prior to and including the filing of the information or indictment, whether in open court or otherwise, and include the preliminary examination or grand jury proceeding;

(2) the "record of the preliminary proceedings" is the court file and the reporter's transcript of the preliminary proceedings;

(3) the "responsible judge" is the judge assigned to try the case or, if none is assigned, the presiding superior court judge or designee of the presiding judge; and

(4) the "designated judge" is the judge designated by the presiding judge to supervise preparation of the record of preliminary proceedings.

(b) Notice of intent to seek death penalty

In any case in which the death penalty may be imposed:

(1) If the prosecution notifies the responsible judge that it intends to seek the death penalty, the judge must notify the presiding judge and the clerk. The clerk must promptly enter the information in the court file.

(2) If the prosecution does not give notice under (1)—and does not give notice to the contrary—the clerk must notify the responsible judge 60 days before the first date set for trial that the prosecution is presumed to seek the death penalty. The judge must notify the presiding judge, and the clerk must promptly enter the information in the court file.

(c) Assignment of judge designated to supervise preparation of record of preliminary proceedings

(1) Within five days after receiving notice under (b), the presiding judge must designate a judge to supervise preparation of the record of the preliminary proceedings.

(2) If there was a preliminary examination, the designated judge must be the judge who conducted it.

(d) Notice to prepare transcript

Within five days after receiving notice under (b)(1) or notifying the judge under (b)(2), the clerk must notify each reporter who reported a preliminary proceeding to prepare a transcript of the proceeding. If there is more than one reporter, the designated judge may assign a reporter or another designee to perform the functions of the primary reporter.

(e) Reporter's duties

(1) The reporter must prepare an original and five copies of the reporter's transcript and two additional copies for each

codefendant against whom the death penalty is sought. The transcript must include the preliminary examination or grand jury proceeding unless a transcript of that examination or proceeding has already been filed in superior court for inclusion in the clerk's transcript.

(2) The reporter must certify the original and all copies of the reporter's transcript as correct.

(3) Within 20 days after receiving the notice to prepare the reporter's transcript, the reporter must deliver the original and all copies of the transcript to the clerk.

(f) Review by counsel

(1) Within five days after the reporter delivers the transcript, the clerk must deliver the original to the designated judge and one copy to each trial counsel. If a different attorney represented the defendant or the People in the preliminary proceedings, both attorneys must perform the tasks required by (2).

(2) Each trial counsel must promptly:

(A) review the reporter's transcript for errors or omissions;

(B) review the docket sheets and minute orders to determine whether all preliminary proceedings have been transcribed;

(C) consult with opposing counsel to determine whether any other proceedings or discussions should have been transcribed; and

(D) review the court file to determine whether it is complete.

(g) Declaration and request for corrections or additions

(1) Within 30 days after the clerk delivers the transcript, each trial counsel must serve and file a declaration stating that counsel or another person under counsel's supervision has performed the tasks required by (f), and must serve and file either:

(A) a request for corrections or additions to the reporter's transcript or court file, or

(B) a statement that counsel does not request any corrections or additions.

(2) If a different attorney represented the defendant in the preliminary proceedings, that attorney must also file the declaration required by (1).

(3) A request for additions to the reporter's transcript must state the nature and date of the proceedings and, if known, the identity of the reporter who reported them.

(4) If any counsel fails to timely file a declaration under (1), the designated judge must not certify the record and must set the matter for hearing, require a showing of good cause why counsel has not complied, and fix a date for compliance.

(h) Corrections or additions to the record of preliminary proceedings

If any counsel files a request for corrections or additions:

(1) Within 15 days after the last request is filed, the designated judge must hold a hearing and order any necessary corrections or additions.

(2) If any portion of the proceedings cannot be transcribed, the judge may order preparation of a settled statement under rule 32.3.

(3) Within 20 days after the hearing under (1), the original reporter's transcript and court file must be corrected or augmented to reflect all corrections or additions ordered. The clerk must promptly send copies of the corrected or additional pages to trial counsel.

(4) The judge may order any further proceedings to correct or complete the record of the preliminary proceedings.

(5) When the judge is satisfied that all corrections and additions ordered have been made and copies of all corrected or additional pages have been sent to the parties, the judge must certify the record of the preliminary proceedings as complete and accurate.

(6) The record of the preliminary proceedings must be certified as complete and accurate within 120 days after the presiding judge orders preparation of the record.

(i) Computer-readable copies

(1) When the record of the preliminary proceedings is certified as complete and accurate, the clerk must promptly notify the reporter to prepare five computer-readable copies of the transcript and two additional computer-readable copies for each codefendant against whom the death penalty is sought.

(2) Each computer-readable copy must comply with the format, labeling, content, and numbering requirements of Code of Civil Procedure section 271, subdivision (b), and any additional requirements prescribed by the Supreme Court, and must be further labeled to show the date it was made.

(3) A computer-readable copy of a sealed transcript must be placed on a separate disk and clearly labeled as confidential.

(4) The reporter is to be compensated for computer-readable copies as provided in Government Code section 69954, subdivision (b).

(5) Within 20 days after the clerk notifies the reporter under (1), the reporter must deliver the computer-readable copies to the clerk.

(j) Delivery to superior court

Within five days after the reporter delivers the computer-readable copies, the clerk must deliver to the responsible judge, for inclusion in the record:

(1) the certified original reporter's transcript of the preliminary proceedings and the copies that have not been distributed to counsel, including the computer-readable copies, and

(2) the complete court file of the preliminary proceedings or a certified copy of that file.

(k) Extension of time

(1) Except as provided in (2), the designated judge may extend for good cause any of the periods specified in this rule.

(2) The period specified in (h)(6) may be extended only as follows:

(A) the designated judge may request an extension of the period by presenting a declaration to the responsible judge explaining why the time limit cannot be met, and

(B) the responsible judge may order an extension not exceeding 90 additional days; in an exceptional case the judge may order an extension exceeding 90 days, but must state on the record the specific reason for the greater extension.

(*l*) Notice that death penalty is no longer sought

After the presiding judge has ordered preparation of the pretrial record, if the death penalty is no longer sought, the clerk must promptly notify the reporter that this rule does not apply.

Advisory Committee Comment (2004)

Revised rule 34.2 is former rule 39.52 and implements Penal Code section 190.9(a). Revised rules 34.2–35.2 govern the process of preparing and certifying the record in any appeal from a judgment of death imposed after a trial that began on or after January 1, 1997; specifically, revised rule 34.2 provides for the record of the preliminary proceedings in such an appeal. Revised rule 35.3 governs the process of certifying the record in any appeal from a judgment of death imposed after a trial that began before January 1, 1997.

Subdivision (a). Revised rule 34.2(a)(1) fills a gap by including grand jury proceedings among the preliminary proceedings it defines. Grand jury proceedings may also result in judgments of death, although their use for that purpose is limited.

Former rule 39.52(b)(1) used the phrase "responsible superior court judge" to refer to the judge assigned to try the case. Because all trial judges are superior court judges after trial court unification, revised rule 34.2(a)(3) deletes the qualifier "superior court" as unnecessary.

Subdivision (b). Former rule 39.52(b) directed the judge to "enter . . . on the record" the fact that the prosecution has given notice of intent to seek the death penalty. Recognizing that it is normally the clerk rather than the judge who makes docket entries, revised rule 34.2(b)(1) instead directs the judge to notify the clerk of the prosecution's notice and directs the clerk to enter that fact in the court file. Similarly, revised rule 34.2(b)(2) clarifies the operation of the presumption of prosecution intent declared by former rule 39.52(b)(2).

Subdivision (f). As used in revised rule 34.2(f)—as in all rules in this part—trial counsel "means both the defendant's trial counsel and the prosecuting attorney." (Revised rule 34(e)(2).)

Subdivision (g). Revised rule 34.2(g)(1), like former rule 39.52(h), requires counsel to file a declaration stating that counsel has performed the tasks required by the rule, i.e., has reviewed the record for completeness and accuracy. Under the former rule, counsel who was satisfied with the state of the record—and therefore had determined not to request any corrections or additions—simply remained silent in regard to any such request, and the court was required to

infer from that silence that counsel did not intend to make a request. In a substantive change designed to prevent any misunderstanding of counsel's intent on this important point, revised rule 34.2(g)(1)(B) requires counsel not intending to request corrections or additions to make a statement to that effect as part of the required declaration.

Revised rule 34.2(g)(3) fills a gap; it is derived from former rule 39.55(b).

Former rule 39.52(i) declared that if any counsel failed to file either the declaration required by the rule or a request for extension of time, the court was directed to "use all reasonable means to ensure compliance with this rule." Although revised rule 34.2(g)(4) deletes the quoted language because it duplicates the governing statute (Pen. Code, § 190.8(a)), the directive remains in force by operation of the statute; for the purposes of the rule, however, it is sufficient to specify—as did the former rule—that in such event the court must set the matter for hearing, require a showing of good cause why counsel has not complied, and fix a date for compliance.

Subdivision (h). Revised rule 34.2(h)(2) fills a gap and reflects current practice. Revised rule 34.2(h)(6) restates a provision of Penal Code section 190.9(a)(2).

Subdivision (i). Former rule 39.52(i)(6) required the reporter to prepare six computer-readable copies of the corrected transcript of the preliminary proceedings. Because the subsequent rules governing preparation of the record in appeals from judgments of death call for only five such copies (former rules 39.53–39.57; revised rules 35–35.3), revised rule 34.2(i)(1) requires the reporter to prepare only five computer-readable copies of the corrected transcript of the preliminary proceedings.

Former rule 39.52(i)(6) required the computer-readable copies of the transcript to comply with former Code of Civil Procedure section 269(c), and former rule 35(b), and the latter rule specified that such copies must be on "CD-ROM or 3.5-inch disks." Rather than enshrining any particular technology in these rules, however, revised rule 34.2(i)(2) simply states that computer-readable copies must comply with the statute (now Code Civ. Proc., § 271(b)) and "any additional requirements prescribed by the Supreme Court." The change is not meant to be substantive, but to provide the flexibility necessary to ensure the record-preparation process remains current with evolving computer technology.

Revised rule 34.2(i)(3) fills a gap; it is derived from former rule 39.54(f). Revised rule 34.2(i)(4) restates a provision of former rule 35(b), second paragraph.

Subdivision (j). Former rule 39.52(j) required the clerk to send the record of the preliminary proceedings—including the computer-readable copies—to the responsible superior court judge "[n]o later than five days after the record has been certified." This provision created an apparent inconsistency with former rule 39.52(i)(6), which gave the reporter 20 days to prepare the same computer-readable copies after the judge certified the record (see former rule 39.52(i)(5)). To resolve this inconsistency, revised rule 34.2(j) provides instead that the five-day period for the clerk to act begins when the reporter delivers the computer-readable copies to the clerk.

Subdivision (*l*). Former rule 39.52(k) required the clerk to notify the reporter if at any time the death penalty was no longer sought "or available." Revised rule 34.2(*l*) deletes the quoted phrase as superfluous: it is assumed the prosecution will not seek the death penalty if for any reason the penalty is or becomes unavailable.

Rule 35. Preparing the trial record

(a) Clerk's duties

(1) The clerk must promptly—and no later than five days after the judgment of death is rendered—notify the reporter to prepare the reporter's transcript.

(2) The clerk must prepare an original and eight copies of the clerk's transcript and two additional copies for each codefendant sentenced to death.

(3) The clerk must certify the original and all copies of the clerk's transcript as correct.

(b) Reporter's duties

(1) The reporter must prepare an original and five copies of the reporter's transcript and two additional copies for each codefendant sentenced to death.

(2) Any portion of the transcript transcribed during trial must not be retyped unless necessary to correct errors, but must be repaginated and bound with any portion of the transcript not previously transcribed. Any additional copies needed must not be retyped but must be prepared by photocopying or an equivalent process.

(3) The reporter must certify the original and all copies of the reporter's transcript as correct and deliver them to the clerk.

(c) Sending the record to trial counsel

Within 30 days after the judgment of death is rendered, the clerk must deliver one copy of the clerk's and reporter's transcripts to each trial counsel, retaining the original transcripts and the remaining copies. If counsel does not receive the transcripts within that period, counsel must promptly notify the superior court.

(d) Extension of time

(1) On request of the clerk or a reporter and for good cause, the superior court may extend the period prescribed in (c) for no more than 30 days. For any further extension the clerk or reporter must file a request in the Supreme Court, showing good cause.

(2) A request under (1) must be supported by a declaration explaining why the extension is necessary. The court may presume good cause if the clerk's and reporter's transcripts combined will likely exceed 10,000 pages.

(3) If the superior court orders an extension under (1), the order must specify the reason justifying the extension. The clerk must promptly send a copy of the order to the Supreme Court.

Advisory Committee Comment (2004)

Revised rule 35 is former rule 39.53 and implements Penal Code section 190.8(b).

Subdivision (a). Revised rule 35(a)(1) deletes the provision of former rule 39.53(b)(2) that required the clerk to deliver the notification of a judgment of death to the reporter "personally or to his or her office or internal mail receptacle" and authorized the clerk to mail the notification if the reporter was not a court employee; the provision was deemed unnecessary micromanagement of the clerk's office. (For the same reason, revised rules 4 and 32 delete similar provisions from the rules on appeals in civil cases and noncapital criminal cases, respectively.)

Revised rule 35(a)(2) deletes as redundant the provisions of former rule 39.53(b)(1) directing that the clerk's transcript must conform to rule 9 and must include the contents of the municipal court file. The form and contents of the clerk's transcript are prescribed in revised rule 34.1.

Subdivision (b). Revised rule 35(b)(1) deletes as redundant the provisions of former rule 39.53(b)(3) directing that the reporter's transcript must conform to rule 9. The form of the reporter's transcript is prescribed in revised rule 34.1.

Subdivision (c). Former rule 39.53(b)(4) directed that the copies of the clerk's and reporter's transcripts that the clerk sent to trial counsel for review be paper copies. Revised rule 35(c) deletes this directive as superfluous: under revised rules 35.1 and 35.2 (former rules 39.54 and 39.55), computer-readable copies of the reporter's transcript are not prepared until the record has been certified as complete and accurate, and no such copies of the clerk's transcript are ever prepared.

Filling a gap, the second sentence of revised rule 35(c) restates a provision of Penal Code section 190.8, subdivision (b).

Subdivision (d). Former rule 39.53(b)(6) authorized the court to presume good cause to extend the time to prepare the transcripts in cases in which the clerk's and reporter's transcripts combined "exceed" 10,000 pages. By definition, however, the transcripts have not been

completed at that point in the process, and so it may not be possible to know whether they exceed 10,000 pages. Revised rule 35(d)(2) therefore provides that good cause may be presumed when the combined transcripts "will likely" exceed 10,000 pages.

Rule 35.1. Certifying the trial record for completeness

(a) Review by counsel during trial

During trial, counsel must call the court's attention to any errors or omissions they may find in the transcripts. The court must periodically ask counsel for lists of any such errors or omissions and may hold hearings to verify them.

(b) Review by counsel after trial

When the clerk delivers the clerk's and reporter's transcripts to trial counsel, each counsel must promptly:

(1) review the docket sheets and minute orders to determine whether the reporter's transcript is complete;

(2) consult with opposing counsel to determine whether any other proceedings or discussions should have been transcribed; and

(3) review the court file to determine whether the clerk's transcript is complete.

(c) Declaration and request for additions or corrections

(1) Within 30 days after the clerk delivers the transcripts, each trial counsel must serve and file a declaration stating that counsel or another person under counsel's supervision has performed the tasks required by (b), and must serve and file either:

(A) a request to include additional materials in the record or to correct errors that have come to counsel's attention, or

(B) a statement that counsel does not request any additions or corrections.

(2) A request for additions to the reporter's transcript must state the nature and date of the proceedings and, if known, the identity of the reporter who reported them.

(3) If any counsel fails to timely file a declaration under (1), the judge must not certify the record and must set the matter for hearing, require a showing of good cause why counsel has not complied, and fix a date for compliance.

(d) Completion of the record

If any counsel files a request for additions or corrections:

(1) The clerk must promptly deliver the original transcripts to the judge who presided at the trial.

(2) Within 15 days after the last request is filed, the judge must hold a hearing and order any necessary additions or corrections. The order must require that any additions or corrections be made within 10 days of its date.

(3) The clerk must promptly—and in any event within five days—notify the reporter of an order under (2). If any portion of the proceedings cannot be transcribed, the judge may order preparation of a settled statement under rule 32.3.

(4) The original transcripts must be augmented or corrected to reflect all additions or corrections ordered. The clerk must promptly send copies of the additional or corrected pages to trial counsel.

(5) Within five days after the augmented or corrected transcripts are filed, the judge must set another hearing to determine whether the record has been completed or corrected as ordered. The judge may order further proceedings to complete or correct the record.

(6) When the judge is satisfied that all additions or corrections ordered have been made and copies of all additional or corrected pages have been sent to trial counsel, the judge must certify the record as complete and redeliver the original transcripts to the clerk.

(7) The judge must certify the record as complete within 90 days after the judgment of death is rendered.

(e) Computer-readable copies

(1) When the record is certified as complete, the clerk must promptly notify the reporter to prepare five computer-readable copies of the transcript and two additional computer-readable copies for each codefendant sentenced to death.

(2) Each computer-readable copy must comply with the format, labeling, content, and numbering requirements of Code of Civil Procedure section 271(b) and any additional requirements prescribed by the Supreme Court, and must be further labeled to show the date it was made.

(3) A computer-readable copy of a sealed transcript must be placed on a separate disk and clearly labeled as confidential.

(4) The reporter is to be compensated for computer-readable copies as provided in Government Code section 69954(b).

(5) Within 10 days after the clerk notifies the reporter under (1), the reporter must deliver the computer-readable copies to the clerk.

(f) Extension of time

(1) The court may extend for good cause any of the periods specified in this rule.

(2) An application to extend the 30-day period to review the record under (c) must be served and filed within that period. If the clerk's and reporter's transcripts combined exceed 10,000 pages, the court may grant an additional three days for each 1,000 pages over 10,000.

(3) If the court orders an extension of time, the order must specify the justification for the extension. The clerk must promptly send a copy of the order to the Supreme Court.

(g) Sending the certified record

When the record is certified as complete, the clerk must promptly send:

(1) To each defendant's appellate counsel and each defendant's habeas corpus counsel: one paper copy of the entire record and one computer-readable copy of the reporter's transcript. If either

counsel has not been retained or appointed, the clerk must keep that counsel's copies until counsel is retained or appointed.

(2) To the Attorney General, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco: one paper copy of the clerk's transcript and one computer-readable copy of the reporter's transcript.

(h) Notice of delivery

When the clerk sends the record to the defendant's appellate counsel, the clerk must serve a notice of delivery on the Supreme Court clerk.

Advisory Committee Comment (2004)

Revised rule 35.1 is former rule 39.54 and implements Penal Code section 190.8(c)–(e).

Subdivision (a). Revised rule 35.1(a) restates Penal Code section 190.8(c); the wording is simplified, but no substantive change is intended.

Subdivision (b). As used in revised rule 35.1(b)—as in all rules in this part—trial counsel "means both the defendant's trial counsel and the prosecuting attorney." (Revised rule 34(e)(2).)

Revised rule 35.1(b)(2) fills a gap; it is derived from former rule 39.52(g)(4).

Subdivision (c). Revised rule 35.1(c)(1), like former rule 39.54(c)(1), requires counsel to file a declaration stating that counsel has performed the tasks required by the rule, i.e., has reviewed the record for completeness. Under the former rule, counsel who was satisfied with the state of the record—and therefore had determined not to request any additions—simply remained silent in regard to any such request, and the court was required to infer from that silence that counsel did not intend to make a request. In a substantive change designed to prevent any misunderstanding of counsel's intent on this important point, revised rule 35.1(c)(1)(B) requires counsel not intending to request corrections or additions to make a statement to that effect as part of the required declaration.

Subdivision (e). Former rule 39.54(f) required the reporter to prepare one additional computer-readable copy of the transcript for each codefendant sentenced to death. Revised rule 35.1(e)(1) requires two such copies: an additional copy is needed to comply with the further requirement of the rule that the clerk send a computer-readable copy to each codefendant's habeas corpus counsel (former rule 39.54(j)(1); revised rule 35.1(g)(1)).

Former rule 39.54(f) required computer-readable copies of the transcript to comply with Code of Civil Procedure section 269(c), and former rule 35(b), and the latter rule specified that such copies must be on "CD-ROM or 3.5-inch disks." Rather than enshrining any particular technology in these rules, however, revised rule 35.1(e)(2) simply states that computer-readable copies must comply with the statute (now Code Civ. Proc., § 271(b)) and "any additional requirements prescribed by the Supreme Court." The change is not meant to be substantive, but

to provide the flexibility necessary to ensure the record-preparation process remains current with evolving computer technology.

Revised rule 35.1(e)(4) restates a provision of former rule 35(b), second paragraph.

Rule 35.2. Certifying the trial record for accuracy

(a) Request for corrections or additions

(1) Within 90 days after the clerk delivers the record to defendant's appellate counsel, any party may serve and file a request for corrections or additions.

(2) A request for additions to the reporter's transcript must state the nature and date of the proceedings and, if known, the identity of the reporter who reported them.

(b) Correction of the record

(1) If any counsel files a request for corrections or additions, the procedures and time limits of rule 35.1(d)(1)–(5) must be followed.

(2) When the judge is satisfied that all corrections or additions ordered have been made, the judge must certify the record as accurate and redeliver the record to the clerk.

(3) The judge must certify the record as accurate within 120 days after it is delivered to appellate counsel.

(c) Computer-readable copies

(1) When the record is certified as accurate, the clerk must promptly notify the reporter to prepare six computer-readable copies of the reporter's transcript and two additional computer-readable copies for each codefendant sentenced to death.

(2) In preparing the computer-readable copies, the procedures and time limits of rule 35.1(e)(2)–(5) must be followed.

(d) Extension of time

(1) The court may extend for good cause any of the periods specified in this rule.

(2) An application to extend the 90-day period to request corrections or additions under (a) must be served and filed within that period. If the clerk's and reporter's transcripts combined exceed 10,000 pages, the court may grant an additional 15 days for each 1,000 pages over 10,000.

(3) If the court orders an extension of time, the order must specify the justification for the extension. The clerk must promptly send a copy of the order to the Supreme Court.

(4) If the court orders an extension of time, the court may conduct a status conference or require the counsel who requested the extension to file a status report on counsel's progress in reviewing the record.

(e) Sending the certified record

When the record is certified as accurate, the clerk must promptly send:

(1) To the Supreme Court: the corrected original record, including the judge's certificate of accuracy, and a computer-readable copy of the reporter's transcript.

(2) To each defendant's appellate counsel, each defendant's habeas corpus counsel, the Attorney General, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco: a copy of the order certifying the record and a computer-readable copy of the reporter's transcript.

(3) To the Governor: the copies of the transcripts required by Penal Code section 1218, with copies of any corrected or augmented pages inserted.

Advisory Committee Comment (2004)

Revised rule 35.2 restates former rules 39.55 and 39.56 and implements Penal Code section 190.8(g).

Subdivision (c). Former rule 39.55(e) required the reporter to prepare one additional computer-readable copy of the transcript for each codefendant sentenced to death. Revised rule 35.2(c)(1) requires two such copies: an additional copy is needed to comply with the further requirement of the rule that the clerk send a computer-readable copy to each codefendant's habeas corpus counsel (former rule 39.56(3); revised rule 35.2(e)(2)).

The provisions of former rule 39.55(e) specifying the format of the computer-readable copies of the reporter's transcript now appear in revised rule 35.1(e).

Subdivision (d). Former rule 39.55(h) authorized the court, after granting an extension of time, to conduct a status conference or require defense counsel to file a status report "90 days after the delivery of the record to [counsel], or at some other reasonable time . . . ." Because it may be assumed the court will not fix an *unreasonable* time for this purpose, revised rule 35.2(d)(4) deletes the quoted provision as unnecessary. No substantive change is intended. And because an extension of time may be requested not only by defense counsel but also by counsel for the People, revised rule 35.2(d)(4) authorizes the court to require a status report simply from "the counsel who requested the extension . . . ."

Subdivision (e). Revised rule 35.2(e) is former rule 39.56. Former rule 39.56(2)–(3) directed the clerk, after the record was certified, to send the parties "a notice enumerating all corrections ordered and stating a date of certification," as well as copies of all the corrected transcript pages. Under revised rule 35.1(d)(4), however, the corrected pages are sent to the parties before certification, and to send a belated list of "all corrections ordered" would serve little purpose. Revised rule 35.2(e) therefore deletes these directives in favor of a copy of the certification order for the parties and a copy of the transcripts and corrected pages for the Governor.

Rule 35.3. Certifying the record in pre-1997 trials

(a) Application

This rule governs the process of certifying the record in any appeal from a judgment of death imposed after a trial that began before January 1, 1997.

(b) Sending the transcripts to counsel for review

(1) When the clerk and the reporter certify that their respective transcripts are correct, the clerk must promptly send a copy of each transcript to each defendant's trial counsel, to the Attorney General, to the district attorney, to the California Appellate Project in San Francisco, and to the Habeas Corpus Resource Center, noting the sending date on the originals.

(2) The copies of the reporter's transcript sent to the California Appellate Project and the Habeas Corpus Resource Center must be computer-readable copies complying with the format, labeling, content, and numbering requirements of Code of Civil Procedure section 271(b) and any additional requirements prescribed by the Supreme Court, and must be further labeled to show the date they were made.

(3) When the clerk is notified of the appointment or retention of each defendant's appellate counsel, the clerk must promptly send that counsel copies of the clerk's transcript and the reporter's transcript, noting the sending date on the originals. The clerk must notify the Supreme Court, the Attorney General, and each defendant's appellate counsel in writing of the date the transcripts were sent to appellate counsel.

(c) Correcting, augmenting, and certifying the record

(1) Within 90 days after the clerk delivers the transcripts to each defendant's appellate counsel, any party may serve and file a request for correction or augmentation of the record. Any request for extension of time must be served and filed in the Supreme Court no later than five days before the 90-day period expires.

(2) If no party files a timely request for correction or augmentation, the clerk must certify on the original transcripts that no party objected to the accuracy or completeness of the record within the time allowed by law.

(3) Within 10 days after any party files a timely request for correction or augmentation, the clerk must deliver the request and the transcripts to the trial judge.

(4) Within 60 days after receiving a request and transcripts under (3), the judge must order the reporter, clerk, or party to make any necessary corrections or do any act necessary to complete the record, fixing the time for performance. If any portion of the oral proceedings cannot be transcribed, the judge may order preparation of a settled statement under rule 32.3.

(5) The clerk must promptly send a copy of any order under (4) to the parties and to the Supreme Court, but any request for extension of time to comply with the order must be addressed to the trial judge.

(6) The original transcripts must be corrected or augmented to reflect all corrections or augmentations ordered. The clerk must promptly send copies of all corrected or augmented pages to the parties.

(7) The judge must allow the parties a reasonable time to review the corrections or augmentations. If no party objects to the corrections or augmentations as prepared, the judge must certify that the

record is complete and accurate. If any party objects, the judge must resolve the objections before certifying the record.

(8) If the record is not certified within 90 days after the clerk sends the transcripts to appellate counsel under (b)(2), the judge must monitor preparation of the record to expedite certification and report the status of the record monthly to the Supreme Court.

(d) Sending the certified record

When the clerk certifies that no party objected to the record or the judge certifies that the record is complete and accurate, the clerk must promptly send:

(1) To the Supreme Court: the original record, including the original certification by the trial judge.

(2) To each defendant's appellate counsel, the Attorney General, and the California Appellate Project in San Francisco: a copy of the order certifying the record.

(3) To the Governor: the copies of the transcripts required by Penal Code section 1218, with copies of any corrected or augmented pages inserted.

(e) Subsequent trial court orders; omissions

(1) If, after the record is certified, the trial court amends or recalls the judgment or makes any other order in the case, including an order affecting the sentence, the clerk must promptly certify and send a copy of the amended abstract of judgment or other order—as an augmentation of the record—to the persons and entities listed in (d).

(2) If, after the record is certified, the superior court clerk or the reporter learns that the record omits a document or transcript that any rule or court order requires to be included, the clerk must promptly copy and certify the document or the reporter must promptly prepare and certify the transcript. Without the need for further court order, the clerk must send the document or transcript—as an augmentation of the record—to the persons and entities listed in (d).

Advisory Committee Comment (2004)

Revised rule 35.3 has limited application, as explained in subdivision (a). It restates portions of former rule 35 relating to death penalty appeals, supplemented by new provisions derived from former rules 39.52–39.55.

Subdivision (b). Revised rule 35.3(b) is based on former rule 35(b) and (c)(1)–(3). Filling a gap, revised rule 35.3(b)(1) and (2) require that the transcripts be sent to the Habeas Corpus Resource Center as well as the California Appellate Project. Both entities bear responsibilities in the postconviction process.

Former rule 35(b) specified that computer-readable copies of the transcript must be on "CD-ROM or 3.5-inch disks." Rather than enshrining any particular technology in these rules, however, revised rule 35.3(b)(2) simply states that computer-readable copies must comply with the relevant statute (Code Civ. Proc., § 271(b)) and "any additional requirements prescribed by the Supreme Court." The change is not meant to be substantive, but to provide the flexibility necessary to ensure the record-preparation process remains current with evolving computer technology. The date-labeling requirement is derived from former rules 39.52(i)(6) and 39.54(f).

Subdivision (c). Revised rule 35.3(c) is based on former rule 35(c)(4). The revised subdivision provides for augmentation of the record (in addition to correction), consistently with practice and with the law governing death penalty appeals in post-1996 cases (see Pen. Code, § 190.8(a) and former rule 39.54).

The second sentence of paragraph (1) of revised rule 35.3(c) is a substantive change intended to expedite record correction and facilitate Supreme Court supervision of the process.

The second sentence of paragraph (4) of revised rule 35.3(c) fills a gap and reflects current practice. Former rule 35(c)(4) also directed the court to determine which corrections had "sufficient potential significance" to require them to be furnished to the parties in the form of corrected pages, and directed that the corrections be made "by strikeover and interlineations where possible." The revised rule deletes these provisions as unnecessary micromanagement of the correction process and as inconsistent with the intent of the statutes and rules governing death penalty appeals in post-1996 cases.

Paragraph (5) of revised rule 35.3(c) is a substantive change intended to facilitate Supreme Court supervision of the process of record correction while preserving the trial court's discretion to extend time to comply with its orders.

Paragraphs (6) and (7) of revised rule 35.3(c) fill gaps in the correction process. They are derived from former rule 39.54(d)(3) and (4), respectively.

Paragraph (8) of revised rule 35.3(c) is derived from former Penal Code section 190.8 and is intended to facilitate Supreme Court supervision of the process of record correction.

Subdivision (d). Former rule 35(e) directed the clerk, after the record was certified, to send the parties "notices enumerating all corrections ordered and stating a date of certification," as well as copies of all the corrected transcript pages. Under revised rule 35.3(c)(6), however, the corrected pages are sent to the parties before certification, and to send a belated list of "all corrections ordered" would serve little purpose. Revised rule 35.3(d) therefore deletes these

directives in favor of a copy of the certification order for the parties and a copy of the transcripts and corrected pages for the Governor.

Subdivision (e). Revised rule 35.3(e) is derived from the last two paragraphs of former rule 35(e).

Former rule 35(e). Former rule 35(e) also provided for the transmission of certain exhibits in criminal appeals. Revised rule 36.1 now governs the transmission of exhibits in death penalty appeals.

Rule 36. Briefs

(a) Contents and form

Except as provided in this rule, briefs in appeals from judgments of death must comply as nearly as possible with rules 13 and 14.

(b) Length

(1) A brief produced on a computer must not exceed the following limits, including footnotes:

(A) Appellant's opening brief and respondent's brief: 95,200 words.

(B) Reply brief: 47,600 words.

(C) Petition for rehearing and answer: 23,800 words.

(2) A brief under (1) must include a certificate by appellate counsel stating the number of words in the brief; counsel may rely on the word count of the computer program used to prepare the brief.

(3) A typewritten brief must not exceed the following limits:

(A) Appellant's opening brief and respondent's brief: 280 pages.

(B) Reply brief: 140 pages.

(C) Petition for rehearing and answer: 70 pages.

(4) The tables, a certificate under (2), and any attachment permitted under rule 14(d) are excluded from the limits stated in (1) or (3).

(5) On application, the Chief Justice may permit a longer brief for good cause.

(c) Time to file

(1) Except as provided in (2), the times to file briefs in an appeal from a judgment of death are as follows:

(A) The appellant's opening brief must be served and filed within 210 days after the record is certified as complete or the superior court clerk delivers the completed record to the defendant's appellate counsel, whichever is later. The Supreme Court clerk must promptly notify the defendant's appellate counsel and the Attorney General of the due date for the appellant's opening brief.

(B) The respondent's brief must be served and filed within 120 days after the appellant's opening brief is filed. The Supreme Court clerk must promptly notify the defendant's appellate counsel and the Attorney General of the due date for the respondent's brief.

(C) If the clerk's and reporter's transcripts combined exceed 10,000 pages, the time limits stated in (A) and (B) are extended by 15 days for each 1,000 pages of combined transcript over 10,000 pages.

(D) The appellant must serve and file a reply brief, if any, within 60 days after the respondent files its brief.

(2) In any appeal from a judgment of death imposed after a trial that began before January 1, 1997, the time to file briefs is governed by rule 33(c).

(3) The Chief Justice may extend the time to serve and file a brief for good cause.

(d) Supplemental briefs

Supplemental briefs may be filed as provided in rule 29.1(d).

(e) Amicus curiae briefs

Amicus curiae briefs may be filed as provided in rule 29.1(f).

(f) Briefs on the court's request

The court may request additional briefs on any or all issues.

(g) Service

(1) The Supreme Court Policy on Service of Process by Counsel for Defendant governs service of the defendant's briefs.

(2) The Attorney General must serve two copies of the respondent's brief on each defendant's appellate counsel and, for each defendant sentenced to death, one copy on the California Appellate Project in San Francisco.

(3) A copy of each brief must be served on the superior court clerk for delivery to the trial judge.

(h) Judicial notice

To obtain judicial notice by the Supreme Court under Evidence Code section 459, a party must comply with rule 22(a).

Advisory Committee Comment (2004)

Revised rule 36 is based primarily on former rules 37 and 39.57.

Subdivision (a). Revised rule 36(a) restates former rule 37(c).

Subdivision (b). Revised rule 36(b)(1) states the maximum permissible lengths of briefs produced on a computer in terms of word count rather than page count. This substantive change tracks a provision in revised rule 14(c) governing Court of Appeal briefs, and is explained in the comment to that provision. Each word count assumes a brief using one-and-one-half spaced lines of text, as permitted by rule 14(b)(5).

Filling a gap, paragraphs (1)(C) and (3)(C) of revised rule 36(b) provide for the maximum permissible length of an answer to a petition for rehearing.

Filling a gap, revised rule 36(b)(4) provides that any attachment under rule 14(d) is to be excluded in calculating the length of a brief. The provision is derived from revised rule 14(c)(3).

Subdivision (c). Subdivision (c)(1) of revised rule 36 restates former rule 39.57; subdivision (c)(2) restates former rule 39.50(a) insofar as it applied to the time to file briefs.

Former rule 39.57(e) provided that the Supreme Court could extend the time to serve and file briefs for good cause, "in accordance with the policies and factors contained in rule 45.5, to the extent they are applicable." Revised rule 36(c)(3) recognizes that this power is vested in the Chief Justice (see rule 45(c)), and deletes the cross-reference to rule 45.5 as unnecessary. No substantive change is intended.

Subdivisions (d) and (e). Revised rule 36(d) and (e) are cross-reference provisions added to clarify the applicability of rule 29.1(d) and (f) to death penalty appeals.

Subdivision (f). Revised rule 36(f) fills a gap by recognizing the Supreme Court's practice of requesting supplemental briefs when necessary.

Subdivision (g). Revised rule 36(g)(1) is a cross-reference to Policy 4 of the Supreme Court Policies Regarding Cases Arising From Judgments of Death. The requirement of revised rule 36(g)(2) that the Attorney General serve the California Appellate Project in San Francisco states current practice.

Subdivision (h). Revised rule 36(h) is a cross-reference provision added to clarify the applicability of rule 22(a) to death penalty appeals.

Rule 36.3. Filing, finality, and modification of decision; rehearing; remittitur

Rules 29.4 through 29.6 govern the filing, finality, and modification of decision, rehearing, and issuance of remittitur by the Supreme Court in an appeal from a judgment of death.

Advisory Committee Comment (2004)

Revised rule 36.3 is new but is not a substantive change. It clarifies the applicability, to death penalty appeals, of the relevant rules governing the decision of civil appeals in the Supreme Court.

Rule 36.1. Transmitting exhibits ~~in death penalty appeals~~; augmenting the record in the Supreme Court

(a) Application

Except as provided in this rule, rule 18 governs the transmission of exhibits to the Supreme Court ~~in death penalty appeals~~.

(b) Time to file notice of designation

No party may file a notice designating exhibits under rule 18(a) until the Supreme Court clerk notifies the parties of the time and place of oral argument.

(c) Augmenting the record in the Supreme Court

At any time, on motion of a party or on its own motion, the Supreme Court may order the record augmented or corrected as provided in rule 12.

Advisory Committee Comment (2004)

Subdivision (c). Revised rule 36.1(c) is new. It is not a substantive change, but is a cross-reference inserted in this rule to clarify the applicability of rule 12 to death penalty appeals.

Advisory Committee Comment (2003)

New rule 36.1(b) restates the first clause of former rule 10(d) insofar as it applies to death penalty appeals.

Rule 36.2. Oral argument and submission of the cause ~~in death penalty appeals~~

(a) Application

Except as provided in this rule, rule 29.2 governs oral argument and submission of the cause in the Supreme Court ~~in death penalty appeals~~ unless the court provides otherwise in its Internal Operating Practices and Procedures or by order.

(b) Procedure

(1) The appellant has the right to open and close.

(2) Each side is allowed 45 minutes for argument.

(3) Two counsel may argue on each side if, ~~not later than 10 days before~~ within 10 days after the date of the order setting the case for argument, they notify the court that the case requires it.

Advisory Committee Comment (2004)

Subdivision (b). Former rule 22(d) required counsel to notify the court not later than 10 days before "the date of the argument" if two counsel wanted to argue a death penalty appeal on each side; subdivision (b)(3) of revised rule 36.2 requires the same notice within 10 days after "the date of the order setting the case for argument." The purpose of the change is to coordinate this provision with the provision governing requests to divide oral argument among multiple counsel in noncapital appeals (rule 29.2(f)(2)). In most cases, however, the revised wording will yield a deadline identical to or no later than that resulting from the former wording, because of

the provision requiring the clerk to give the parties at least 20 days' notice of the date of the argument (rule 29.2(c)).

Advisory Committee Comment (2003)

New rule 36.2(b) restates without change former rule 22 insofar as it applies to death penalty appeals.

~~**Rule 30. Rules governing criminal appeals**~~

~~The rules governing appeals from the superior court in civil cases shall be applicable to appeals from the superior court in criminal cases except where express provision is made to the contrary, or where the application of a particular rule would be clearly impracticable or inappropriate.~~

~~**Rule 31. Notice of appeal**~~

~~**(a) [Time of filing]** In the cases provided by law, an appeal is taken by filing a written notice of appeal with the clerk of the superior court within 60 days after the rendition of the judgment or the making of the order. A notice of appeal filed prior to the time prescribed therefor is premature but may, in the discretion of the reviewing court for good cause, be treated as filed immediately after the rendition of the judgment or the making of the order.~~

~~Whenever a notice of appeal is received by the clerk of the superior court after the expiration of the period prescribed for filing such notice, the clerk shall mark it "Received (date) but not filed" and advise the party seeking to file the notice that it was received but not filed because the period for filing notice of appeal had elapsed.~~

~~If the attorney for a defendant either files a notice of appeal for the defendant or assists the defendant in filing it, the attorney shall serve a copy on the court reporter, lead reporter, or reporting supervisor, and file proof of the service; but the attorney's failure to do so does not affect the validity of the appeal. The reporter shall begin work on the transcript immediately upon being served with a copy of the notice of appeal or upon notice from the clerk, whichever is earlier.~~

~~*(Subd (a) amended effective July 1, 1990; previously amended effective January 1, 1951, January 1, 1959, January 1, 1961, September 15, 1961, November 13, 1968, and January 1, 1972.)*~~

~~**(b) [Form of notice]** If the appeal is by the defendant the notice shall be signed by him or by his attorney, and if the appeal is by the People, the notice shall be signed by the district attorney, his deputy, or other counsel for the People. The notice shall be sufficient if it states in substance that the party appeals~~

from a specified judgment or order or a particular part thereof, and shall be liberally construed in favor of its sufficiency. The notice need not specify the court to which the appeal is taken, and, except when judgment of death was pronounced, a notice shall be deemed to be an appeal to the Court of Appeal for the district.

(Subd (b) amended effective July 1, 1971; previously amended effective September 1, 1967.)

(c) [Notification by clerk] The clerk of the superior court shall forthwith transmit a copy of the notice of appeal and a copy of the sequential list of reporters made pursuant to rule 980.4 to the clerk of the reviewing court and mail a notification of the filing of the notice of appeal to each party other than the appellant. The notification shall state the number and title of the case and the date the notice of appeal was filed. The failure of the clerk to mail such notice or to give such notification shall not affect the validity of the appeal.

(Subd (c) amended effective January 1, 1992; adopted effective July 1, 1964; and previously amended effective January 1, 1972.)

(d) [Guilty or nolo contendere plea] If a judgment of conviction is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files the statement the trial court shall execute and file either a certificate of probable cause or an order denying a certificate and shall forthwith notify the parties of the granting or denial of the certificate.

If the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds.

The time for preparing, certifying, and filing the record on appeal or for filing an agreed statement shall begin when the appeal becomes operative.

(Subd (d) amended effective March 17, 1989.)

(e) [Receipt by mail from custodial institution] If a notice of appeal is received by mail from a custodial institution after the time within which it may be filed under subdivision (a),

(1) the envelope in which it was received shall be retained by the clerk of the trial court and made part of the case file; and

(2) an examination of the envelope in which it was mailed clearly demonstrates that it was mailed or delivered to custodial officials for mailing within the time prescribed by subdivision (a), the notice shall be deemed timely and shall be filed, notwithstanding subdivision (a).

This subdivision is intended to enlarge the authority of the clerk to file a notice of appeal under the stated circumstances. It is not intended to limit the appeal rights of the defendant under the "prison-delivery rule," as stated in *In re Jordan* (1992) 4 Cal.4th 116, or under other applicable case law.

(Subd (e) as adopted effective January 1, 1994.)

Rule 31 amended effective January 1, 1994; previously amended March 17, 1989, July 1, 1990, January 1, 1992.

Drafter's Notes

1989—Rule 31(d) was amended effective March 17, 1989, by deleting the requirement of a certificate of probable cause for an appeal after a guilty plea, to conform to a recent amendment to Penal Code section 1237.5.

Rule 31(d) was also amended, effective January 1, 1992, to restore the requirement of a certificate of probable cause, to conform to the sunset clause in Penal Code section 1237.5 which restores the former law.

1990—The Judicial Council amended rule 31 to require that counsel who assists a defendant in filing a notice of appeal shall serve a copy of the notice on the court reporter, and to require the reporter to begin work on the transcript upon receiving the notice.

1992—See note following rule 980.4.

1994—Rule 31 is amended to require that when a notice of appeal is received "late" by mail from a custodial institution, the clerk shall preserve the envelope in which it was mailed; and if it clearly demonstrates that it was mailed or delivered to custodial officials for mailing within the time allowed for filing, deem it timely.

Rule 32. Stay of execution and bail on appeal

(a) [Stay of execution] An application to the reviewing court for a stay of execution of a judgment of conviction on an appeal pending therein shall include a showing that proper application for a stay was made to the superior court, and that the superior court unjustifiably refused to grant the stay. Pending a ruling on the application, the reviewing court may order the

execution of the judgment stayed, and if it so orders it shall notify the trial court pursuant to rule 56(d).

(Subd (a) amended effective January 1, 1984.)

(b) [Bail] An application to the reviewing court for bail or to reduce bail on an appeal pending therein shall be made on such notice to the district attorney and the Attorney General as the court may determine, and shall include a showing that proper application for bail or a reduction of bail was made to the superior court and that such court unjustifiably denied the application.

Rule 32 amended effective January 1, 1984.

Drafter's Notes

1983 Rules 32, 49, 56, and 140 were amended to assure prompt notice to trial courts of urgent appellate court action.

Rule 33. Contents of record on appeal from judgment or order on motion for new trial; noncapital cases

(a) [Normal record] If the appeal is taken by the defendant from a judgment of conviction, or if the appeal is taken by the People from an order granting a motion for a new trial, the record on appeal, except as stated in this rule, shall include the following (which shall constitute the normal record):

(1) A clerk's transcript, containing copies of

(a) the notice of appeal, any certificate of probable cause executed and filed by the court, and any request for additional record and any order made pursuant thereto;

(b) the indictment, information or accusation with any amendments;

(c) any demurrer;

(d) any motion for a new trial, with supporting and opposing memoranda and affidavits;

(e) all minutes of the court relating to the action;

(f) the verdict;

(g) the judgment or order appealed from and any abstract of judgment – commitment;

(h) all written instructions given or refused indicating on each instruction the party requesting it;

~~(i) all written communications, formal or informal, between the court and the jury or any individual jurors;~~

~~(j) any written opinion of the court;~~

~~(k) any transcript of an electronic sound or sound-and-video recording that was provided to the jury or tendered to the court under rule 203.5.~~

~~If the appeal is by the defendant, the clerk's transcript shall also include copies of~~

~~(l) each written motion made by defendant and denied in whole or in part, with supporting and opposing memoranda and related affidavits, search warrants and returns, and the transcript of any preliminary examination or grand jury hearing related thereto;~~

~~(m) the report of the probation officer;~~

~~(n) any certified records of a court or of the Department of Corrections introduced in evidence to prove a prior conviction or prior prison term.~~

~~(2) A reporter's transcript of~~

~~(a) the oral proceedings taken on the trial of the cause, including motions in limine heard by the trial judge, jury instructions, and proceedings at the time of sentencing, granting of probation, or other dispositional hearing, but excluding the voir dire examination of jurors and opening statements;~~

~~(b) the oral proceedings on the hearing of the motion for a new trial, and on the entry of any plea other than a plea of not guilty;~~

~~(c) any oral opinion of the court.~~

~~If the appeal is by the defendant, the reporter's transcript shall also contain~~

~~(d) the oral proceedings on any motion made by defendant under section 1538.5 of the Penal Code and denied in whole or in part;~~

~~(e) closing arguments to the jury, comments on the evidence by the court before the jury, and all communications to and from the jury~~

after instructions have been given whether or not denominated as questions or instructions.

(3) To be transmitted as originals upon request by the reviewing court as provided in rule 10; any exhibit admitted in evidence or rejected.

(Subd (a) amended effective January 1, 1997; previously amended effective January 1, 1966, January 1, 1968, November 13, 1968, July 1, 1971, January 1, 1976, July 1, 1976, January 1, 1982, January 1, 1984, January 1, 1990, January 1, 1992, July 1, 1993.)

(b) [Request for additional record] The People may request inclusion in the record on an appeal by the People of any item that would be included on an appeal by the defendant. Either party may request the inclusion in the record of any of the following:

(1) In the clerk's transcript: any motion made by the defendant that was granted or any motion made by the People, with supporting and opposing memoranda and affidavits.

(2) In the reporter's transcript:

(a) proceedings on the voir dire examination of jurors;

(b) opening statements;

(c) oral proceedings on motions other than those enumerated in subdivision (a).

(3) To be transmitted as originals: any exhibits admitted in evidence or rejected that have not been requested by the reviewing court under subdivision (a).

An application for additional record shall describe the material to be included and state how it may be useful on appeal. The application shall be filed with the notice of appeal or as soon thereafter as is practicable; it shall be deemed denied if it is filed after the record on appeal is transmitted to the reviewing court. The clerk shall immediately present the request to the judge and notify the reporter. The judge, within five days after the filing of the application, shall make an order directing the inclusion in the record of as much of the additional material as, in the judge's opinion, may be proper to present fairly and fully the points relied on by appellant in the application. Any denial of the application in the trial court shall be without prejudice to an application under rule 12. If the judge fails to make any order within five days after the application is filed, the material requested, with the exception of exhibits, shall be included in the clerk's and reporter's transcripts without an order.

(Subd (b) amended effective January 1, 1982; previously amended January 1, 1959, January 1, 1966, July 1, 1970, July 1, 1971, July 1, 1976, and July 1, 1977.)

(c) [Record where automatic appeal] When a judgment of death has been rendered, preparation and filing of the record is governed by rules 35 and 39.50 through 39.56.

(Subd (c) amended effective January 1, 1999; previously amended effective January 1, 1983.)

(d) [Subsequent orders] If the judgment is amended or recalled after the transcript is certified, copies of the amended abstract of judgment or other new dispositional order shall be certified and transmitted to the reviewing court, the defendant, the Attorney General, and defendant's counsel on appeal. If the identity of defendant's counsel on appeal is unknown, that copy shall be sent to the reviewing court with a request that it be forwarded to counsel. The amended abstract or other new order is deemed an augmentation of the record on appeal.

(Subd (d) adopted effective July 1, 1983.)

(e) [Repealed 1997.]

(Subd (e) repealed effective January 31, 1997; adopted effective January 1, 1994. The repealed subdivision related to transcript from electronic recording.)

Rule 33 amended effective January 1, 1999; previously amended effective January 1, 1982, January 1, 1983, January 1, 1984, January 1, 1990, January 1, 1992, July 1, 1993, January 1, 1994, January 1, 1997, and January 31, 1997.

Drafter's Notes

1981—Following recommendations from the Chief Justice's Special Committee on Practice and Procedure in the First Appellate District and several other sources, the rule has been amended to expand the normal record on appeal of criminal cases so as to include the items most commonly sought in requests for augmentation, and thus reduce the delay and expense generated by augmentation requests.

January 1983—Several amendments and a new rule were adopted to clarify procedure in death penalty appeals and to facilitate preparation of the entire record in those appeals.

(a) Rule 33 was amended by deleting references to the record in death penalty cases and substituting references to rules 35 and 39.5.

(b) Rule 35(a) was amended to require an original and five copies of the record, plus two copies for each additional defendant sentenced to death.

(c) Rule 35(c) was amended to specify that a copy of the transcripts shall be sent to the Attorney General as soon as the transcripts are completed in a death case, and that a copy shall be sent to defense counsel on appeal upon appointment or retention.

(d) Rule 35(e) was amended to clarify the disposition of the district attorney's copy of the transcripts in a noncapital case, to specify that in death cases a notice of the corrections ordered by the trial court shall be sent to the parties and to refer to the Penal Code section 1218 requirement that a copy of the transcripts be sent to the Governor.

(e) A new subdivision (h) was added to rule 35, to require the Clerk of the Supreme Court to supervise preparation of the record in death cases, paralleling the corresponding provision for other felony appeals.

(f) A new rule 39.5 was adopted governing death penalty cases exclusively to provide notice to the Clerk of the Supreme Court and to the Attorney General of pronouncement of a death sentence so that each may monitor the case, to specify the contents of the record, and to modify the normal time limits for requesting correction of the record and for delivery of the request for corrections to the trial judge.

November 1983—At the suggestion of a deputy state public defender, new subdivision (d) was added to rule 33 to require that a copy of any amended abstract of judgment or other order entered in a criminal case, after the record on appeal is certified, be sent to the reviewing court and to counsel on appeal. And rules 33 and 34 were amended to require inclusion of the abstract of judgment in the clerk's transcript in criminal appeals.

1990—The council amended rule 33 (defining the normal record on appeal in criminal cases) to require the record to include all communications with the jury, and adopted rule 231 to require superior court trial judges in civil and criminal cases to preserve all written communications to or from the jury.

1992—Rule 33(a) (contents of record in criminal appeals) was amended to require inclusion, in the normal clerk's transcript, copies of certified records of a court or of the Department of Corrections used to prove a prior conviction or prior prison term. These documents have not been readily available to counsel.

Rule 33.5 (confidential in-camera proceedings) will now require the clerk of the Court of Appeal to send a copy of any Marsden hearing transcript to appellate defense counsel without the necessity of an application. The prosecution will be entitled to receive a copy, upon their motion, if the defense brief raises a Marsden issue.

1994—Rule 33(e) provides that the requirement of the contents of the record on appeal for a court reporter's transcript is satisfied by a transcript produced from an electronically recorded proceeding. This subdivision does not authorize the use of electronic recording to make the record of proceedings in a case in which a death sentence may be imposed.

January 1997—Rules 33(a) and 203.5 were amended to implement the existing requirement in rule 203.5, that transcripts of recordings played at trial be included in the

record on appeal. The amendments require that such transcripts be filed with the clerk and that they be included in the normal record in a criminal appeal.

1999 Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the time limit for filing a motion to correct the record in capital cases in which the trial commenced before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the reporter's transcript be delivered to the Attorney General in computer-readable form only; and (4) require that copies of the record be provided for postconviction counsel and the Habeas Corpus Resource Center.

Rule 33.5. Confidential in-camera proceedings

(a) [*Marsden* hearings] In addition to the normal record required by any other rule, the record on appeal in a criminal action and in an appeal from the juvenile court shall also include a sealed reporter's transcript of hearings held pursuant to *People* v. *Marsden* (1970) 2 Cal.3d 118. The original and two copies of the sealed transcript shall accompany the record upon its transmission to the reviewing court. The chronological index to the reporter's transcript shall refer to the *Marsden* hearing and state "SEALED" or the equivalent.

The clerk of the reviewing court shall send a copy of the transcript to the defendant's or juvenile's counsel on appeal when counsel is appointed or, in the case of retained counsel, when he or she has appeared in the cause.

If the defendant or juvenile raises a *Marsden* issue in his or her brief, the People shall be sent a copy of the transcript upon their written request unless appellant has served and filed, with the appellant's opening brief, a notice that the *Marsden* transcript contains confidential material not relevant to the issues raised on appeal. If a notice to that effect is served and filed, the People may file a motion to obtain a copy of relevant portions of the confidential transcript.

(Subd (a) amended effective July 1, 1992; adopted effective July 1, 1990; and previously amended effective January 1, 1992.)

(b) [Other in-camera proceedings] In addition to the additional record that may be requested under any other rule, the record on appeal in a criminal action and in an appeal from the juvenile court may, upon request and trial court order as provided in rule 33(b), also include:

(1) A sealed, separately paginated reporter's transcript of any confidential in-camera proceeding from which a party was excluded from being represented. The trial judge may order that the transcript be prepared personally by the court reporter who attended the proceeding. The

chronological index to the reporter's transcript shall refer to the in-camera proceeding and state "SEALED" or the equivalent.

(2) Written materials submitted to the trial court, all or part of which were determined to be confidential and were withheld from a party.

This reporter's transcript and confidential material, if made part of the record, shall be transmitted to the reviewing court in sealed envelopes marked "CONFIDENTIAL — MAY NOT BE EXAMINED WITHOUT COURT ORDER." Unless otherwise ordered by the reviewing court, the materials described in this subdivision may be examined only by a judge of the reviewing court personally. The reviewing court shall permit examination of these materials by parties to whom the information was accessible in the trial court and their attorneys.

Sealed envelopes containing confidential materials shall be securely filed and kept separately from the main file in the cause.

(c) If at any time the clerk or reporter learns that a document or transcript required by this rule to be included in the record on appeal was inadvertently omitted, or learns that material required by another rule to be transmitted and required by this rule to be under seal was inadvertently omitted, the clerk and reporter shall comply with rule 35(e) with respect to transmitting the document or transcript to the reviewing court as an augmentation to the record without the necessity of a court order, and shall comply with this rule with respect to sealing and with respect to which party's counsel, if any, shall receive a copy.

(Subd (c) as adopted effective January 1, 1994.)

Rule 33.5 amended effective January 1, 1994; adopted effective July 1, 1990; and previously amended effective January 1, 1992, July 1, 1992.

Drafter's Notes

1990 The council adopted new rule 33.5 to standardize the way a record of confidential in-camera proceedings is transmitted to the reviewing court. Rule 33.5(a) deals with proceedings pursuant to *People* v. *Marsden* (1970) 2 Cal. 3d 118, and rule 33.5(b) deals with all other confidential in-camera proceedings. The council also adopted new rule 859 to ensure that the fact that there were confidential proceedings will appear in the minutes.

January 1992 See note following rule 33.

July 1992 Rule 33.5(a) was amended to protect against inadvertent disclosure to the People of a *Marsden* motion transcript that is not relevant to the issues raised on appeal. If the appellant raises a *Marsden* issue on appeal, the People can receive a copy of the transcript on request unless the appellant has filed a notice that the *Marsden* transcript contains confidential material not relevant to the issues raised on appeal. If a notice to

that effect is filed, the People may secure a copy of relevant portions of the *Marsden* transcript by motion.

1994 Rule 33.5 is amended to require transmission of omitted confidential material promptly, under seal.

Rule 33.6. Sealing juror-identifying information in the record on appeal (Code Civ. Proc., §237)

The clerk and reporter shall use the following procedures to comply with Code of Civil Procedure section 237(a)(2) when preparing the clerk's transcript, the reporter's transcript, or any other document included in the appellate record that contains juror-identifying information:

(1) *(Jurors' names)* The names of trial jurors, including alternates, who were sworn to hear the case shall be redacted from all documents, and an identifying number shall be substituted wherever a juror's name appears. The clerk shall prepare a key correlating the jurors' names with their identifying numbers, which shall be used by both the clerk and the reporter in preparing transcripts or other documents. The key shall be kept under seal in the trial court's file.

(2) *(Addresses and telephone numbers)* The addresses and telephone numbers of trial jurors, including alternates, who were sworn to hear the case shall be redacted from the original and all copies of the transcript.

(3) *(Capital cases)* In appeals in capital cases, an unredacted version of the redacted pages and a copy of the key correlating juror names with numbers shall be bound together and transmitted to the Supreme Court under seal.

(4) *(Potential jurors)* Juror-identifying information about potential jurors who were called for the case but were not sworn to sit as trial jurors or alternates shall not be sealed unless an order so directing has been issued under Code of Civil Procedure section 237(a)(1).

Rule 33.6 adopted effective July 1, 1997.

Rule 34. Contents of record on appeal in other noncapital cases

If the appeal is taken by the People from a judgment on a demurrer to the indictment, information or accusation, or by the defendant or the People from any appealable order other than an order on motion for a new trial, the record on appeal shall include the following:

(1) A clerk's transcript, containing copies of

(a) the notice of appeal;

(b) the indictment, information or accusation and all pleas;

(c) any demurrer;

(d) any judgment, and any order appealed from;

(e) any motion or notice of motion, the granting or denial of which constitutes the order appealed from;

(f) all affidavits filed in support of or in opposition to the motion;

(g) the minutes of the court relating to the judgment or order appealed from; and

(h) any abstract of judgment – commitment.

(2) Any reporter's transcript of the oral proceedings incident to the order appealed from.

(3) All exhibits admitted in evidence at the proceedings incident to the order appealed from.

Rule 34 amended effective January 1, 1984.

Drafter's Notes

1983 See note following rule 33.

Rule 34.5. Ordering transcript upon conviction after trial

This rule is adopted under Code of Civil Procedure section 269(b).

Notwithstanding rule 35(b) or any other rule, the trial judge shall order the reporter and the clerk to begin preparing the record on appeal immediately after a verdict or finding of guilty of a felony is announced after a trial on the merits, unless the court determines that it is likely that no appeal from the decision will be made.

In determining the likelihood of an appeal, the trial judge shall consider the facts of the case and the following standards:

(1) An appeal is very likely if

(a) the defendant has been convicted of a crime for which probation is prohibited or is prohibited except in unusual cases; or

(b) the trial involved a contested question of law important to the outcome.

(2) An appeal is less likely if neither of the factors identified in the preceding paragraph was present.

(3) An appeal is unlikely in relatively few cases that are tried to a verdict or finding of guilt.

(4) If the judge is undecided whether an appeal is likely, the judge should order immediate preparation of the record.

The trial judge's determination to order immediate preparation of the record or not to do so is an administrative decision intended to further the efficient operation of the courts. The determination is not intended to affect any substantive or procedural right of either the defendant or the People. The determination shall not be cited to prove or disprove any issue of law or fact in the case and should not, therefore, be reviewable on appeal or by writ.

Rule 34.5 as adopted and amended effective January 1, 1991.

Drafter's Notes

1990 The council adopted rule 34.5 to implement Statutes of 1990, chapter 636. The rule sets forth standards for superior courts to use in deciding whether to order transcript preparation to begin immediately after conviction by full trial of a felony. In general, the standard recognizes that the great majority of defendants convicted of a felony after trial are likely to appeal; and that if in doubt, therefore, the judge should order early preparation of the transcript.

Superior court judges are urged to note instances when the new statute and rule result in transcripts but the defendant does not appeal; and instances when the rule failed to indicate that early preparation should be ordered, but the defendant does appeal. Summaries of these instances, and suggestions for improving the rule, should be sent to the Administrative Office of the Courts after at least three months' experience with the new procedure.

Rule 35. Preparation, certification, and filing of record

(a) [Clerk's transcript] Within 20 days after the filing of the notice of appeal the clerk shall prepare an original and two clearly legible copies of the clerk's transcript, in the manner and form required by rule 9. The time for preparing the clerk's transcript may be extended as provided in rule 45(c). The time for preparation in a case in which a judgment of death was entered shall be as specified in rule 39.5; if that rule fails to specify a time, the clerk's transcript shall be prepared within a reasonable time. On the entry of a judgment of death the clerk shall prepare an original and six copies, including the copy for the Governor required by Penal Code section 1218. The clerk shall append to the original and each copy a certificate that it is correct. An additional copy of the transcript shall be prepared for the district attorney upon the request of the

district attorney in noncapital cases. When there is more than one appealing defendant, the clerk shall prepare an additional copy of the transcript for each additional defendant up to a total of two additional copies, except in a case in which a judgment of death has been rendered against one or more of the defendants, when an additional copy shall be prepared for each additional defendant not sentenced to death, and two copies for each defendant sentenced to death.

(Subd (a) amended effective July 1, 1995; previously amended effective January 1, 1959, January 1, 1961, July 1, 1971, January 1, 1983, January 1, 1995.)

(b) [Reporter's transcript] Where a reporter's transcript is required, the clerk, immediately on the filing of the notice of appeal, shall notify the reporter. The notice shall be delivered to the reporter personally or to his or her office or internal mail receptacle; if the reporter is not employed by the court, the notice may be mailed. Except as provided in the next paragraph, the reporter shall prepare an original and the same number of clearly legible copies of the reporter's transcript as are required of the clerk's transcript by subdivision (a), in the manner and form required by rule 9, and shall append to the original and each copy a certificate that it is correct. The reporter shall deliver the original and all the copies to the clerk immediately on their completion, and in no case more than 20 days after the filing of the notice of appeal unless the time is extended as provided in subdivision (d).

When a judgment of death has been rendered against one or more of the defendants, one copy of the reporter's transcript shall be in computer-readable form conforming to the requirements of Code of Civil Procedure section 269(c). Disks shall be CD-ROM or 3.5-inch disks, and 3.5-inch disk labels shall state whether the disk is compatible with IBM-PC or with Apple Macintosh computers. This rule constitutes an order for a second copy of the transcript in computer-readable format ordered at the same time and by the same party as the original transcript, within the meaning of Government Code section 69954(b), and that copy is therefore to be paid for at one-third the rate otherwise provided for second copies.

Portions of the transcript that were prepared during the trial shall not be retyped unless necessary to correct errors. They shall be bound together with transcripts of any portions of the proceedings not previously transcribed and renumbered. If additional copies are needed, they shall be prepared by photocopying or an equivalent process and not by retyping.

One week after the deadline for filing the transcript, the clerk shall accept completed portions of the transcript from the lead reporter in a multireporter case even if not all portions of the transcript are completed. The clerk shall pay promptly each reporter who certifies under penalty of perjury that all of his or her portions of the transcript are completed.

~~*(Subd (b) amended effective January 1, 2003; previously amended effective January 1, 1959, July 1, 1971, January 1, 1985, July 1, 1990, January 1, 1992, January 1, 1995.)*~~

~~**(c) [Delivery]** As soon as both the clerk's and reporter's transcripts are completed, the clerk shall (i) deliver one copy to each appellant's appellate attorney, one copy to the Attorney General, and, if a judgment of death has been rendered, one copy to each appellant's trial attorney, one copy to the district attorney, and one copy to the California Appellate Project in San Francisco; and (ii) note the dates of the deliveries on the original.~~

~~(1) (*CAP copy*) The copy for the California Appellate Project shall include the computer-readable copy of the reporter's transcript rather than a paper copy.~~

~~(2) (*Delivery to prosecution in noncapital cases*) If a judgment of death was not rendered, the clerk shall send the district attorney a notice of delivery of the prosecutions copy to the Attorney General.~~

~~(3) (*Delivery to appellate counsel in capital cases*) When the clerk is notified of the appointment or retention of counsel on appeal for a defendant sentenced to death, a copy shall be delivered to counsel on appeal and the date the record was mailed or otherwise transmitted noted on the original. The clerk shall send notice to the Supreme Court, the Attorney General, and to the defendant's appellate counsel of the date the record was transmitted to the defendant's appellate counsel. If there are four or more appealing defendants in a case in which a judgment of death has not been rendered against any defendant, the clerk shall make one copy of both transcripts available for use by the defendants or their attorneys as provided in rule 10.~~

~~(4) (*Request for corrections in capital cases*) When a judgment of death has been rendered, any party may serve and file a request for correction of these transcripts within 90 days after the date the record was delivered to appellate counsel. For purposes of this paragraph, if the record was mailed, the date of delivery is five days after the date of the mailing. If no request for correction is filed within that time, or within any extension of time granted by the Supreme Court, the clerk shall immediately certify on the original transcripts that no objection was made within the time allowed by law and transmit the original transcripts to the reviewing court as provided in subdivision (e). If a proposed correction is filed within that time, the clerk shall deliver the transcripts to the judge within 10 days of the date the request for corrections is filed. The trial judge shall determine whether the requested corrections shall be made within 60 days of the date the request for corrections is filed. The court shall also determine which~~

~~corrections have sufficient potential significance to require that they be furnished to the parties in the form of copies of corrected transcript pages. The original transcripts shall be corrected to reflect all corrections ordered, by strikeover and interlineation where possible. After corrections have been made, the judge shall certify that all objections have been determined, and that the transcripts have been corrected in accordance with such determination, and shall redeliver the transcripts to the clerk.~~

~~(5) (*Time of transmission to reviewing court*) In a case in which a judgment of death has not been rendered, the original transcripts shall be transmitted to the reviewing court at the same time copies are delivered to the parties. If there are four or more appealing defendants represented by separate counsel in a case in which judgment of death has not been rendered against any defendant, the appellants' copies shall be made available for the use of the appellants as directed by the appellate court.~~

~~*(Subd (c) amended effective January 1, 2000; previously amended effective January 1, 1959, July 1, 1971, January 1, 1972, July 1, 1972, January 1, 1991, January 1, 1995, and January 1, 1999.)*~~

~~**(d) [Extensions of time]** The periods allowed by this rule for preparation of the record shall not be extended by the superior court, but on affidavit showing good cause, and, in the case of a reporter's transcript, on certification by the presiding judge of the superior court or a court administrator designated by the presiding judge that the extension is reasonable and necessary in light of the workload of all reporters in the court, the reviewing court may extend time for not exceeding 60 days in the aggregate.~~

~~*(Subd (d) amended effective January 1, 1985.)*~~

~~**(e) [Transmission]** The clerk shall transmit the original transcripts to the clerk of the reviewing court forthwith after certification of the individual transcripts pursuant to subdivisions (a) and (b) or, if a judgment of death was rendered against any defendant, after correction pursuant to subdivision (c). Unless a judgment of death has been rendered against any defendant, the district attorney shall deliver to the clerk a copy of each transcript furnished the district attorney under subdivision (c). The clerk shall transmit to the Attorney General that copy of each transcript. When a judgment of death has been rendered, the clerk shall, instead, transmit to the Attorney General and all parties~~

~~(1) notices enumerating all corrections ordered and stating a date of certification, and~~

(2) copies of any pages of the corrected transcripts on which there are corrections that the judge determined pursuant to subdivision (c) shall be furnished to the parties in that form.

The copies of corrected pages shall ordinarily be xerographic copies of the originals or their equivalent. In those cases, the clerk shall also transmit the copies of the transcripts required by Penal Code section 1218, with copies of pages containing corrections ordered to be furnished in that form inserted, and with a copy of the notice of corrections. The date of transmission of copies to the Attorney General shall be noted on the original transcripts by the clerk of the superior court. All exhibits admitted in evidence or rejected which are made part of the record on appeal by rule 33 or 34 shall be transmitted to the reviewing court as originals as provided in rule 10. If any exhibits were requested by an appellant as provided in subdivision (b) of rule 33, but the superior court failed to make an order pursuant to the request, the exhibits shall be transmitted only on request of the reviewing court.

The probation officer's report, included in the clerk's transcript pursuant to rule 33(a)(1)(*l*), shall be included in the parties' copies of the record on appeal as well as in the copy sent to the reviewing court. The reviewing court's copy of the probation officer's report shall be in a sealed envelope marked "Confidential—May Not Be Examined Without Court Order—Probation Officer Report."

If at any time the clerk or reporter learns that a document or transcript required by rule 33, 34, or 39.5 to be included in the record on appeal was inadvertently omitted, the clerk shall copy the document or the reporter shall prepare the transcript, and the clerk shall certify and transmit the document or transcript to the reviewing court as an augmentation to the record without the necessity of a court order. The clerk shall give the parties prompt notice of the transmittal and send copies as provided in this subdivision and in subdivision (c).

If, during the pendency of the appeal, the trial court makes any new order in the case, including, but not limited to, an order affecting the sentence or affecting probation, the clerk shall certify and transmit to the reviewing court and the probation officer a copy of the order as an augmentation of the record. The parties shall be given prompt notice of the transmittal and sent copies as provided in this subdivision and in subdivision (c).

(Subd (e) amended effective January 1, 1993; previously amended effective January 1, 1961, July 1, 1971, January 1, 1972, January 1, 1983, July 1, 1983, July 1, 1985, July 1, 1989, January 1, 1991.)

(f) [Stipulation for partial transcript] If counsel for both defendant and the People stipulate in writing before the preparation of the record is completed that any part of the record is not required for the proper hearing of the appeal, such part shall not be prepared or transmitted to the reviewing court.

(g) [Supervision of preparation of record] Each clerk of a Court of Appeal, acting under the supervision of the Administrative Presiding Justice or the Presiding Justice, shall take all appropriate steps to insure that the clerks and reporters of the superior courts perform their duties under this rule promptly. This provision shall not affect the superior courts' responsibility for the prompt preparation of records on appeal.

(Subd (g) as adopted effective January 1, 1972.)

(h) [Supervision of preparation of record, death penalty cases] In cases in which judgments of death have been rendered the Clerk of the Supreme Court, acting under the supervision of the Chief Justice shall take all appropriate steps to ensure that the clerk and reporters of the superior court perform their duties under these rules promptly. This provision does not affect the superior court's responsibility for the prompt preparation of records on appeal in capital cases.

(Subd (h) adopted effective January 1, 1983.)

Rule 35 amended effective January 1, 2000; previously amended effective January 1, 1983, January 1, 1985, July 1, 1990, January 1, 1991, January 1, 1992, January 1, 1993, January 1, 1995, July 1, 1995, and January 1, 1999.

Drafter's Notes

1983—See note following rule 33. Rule 35 was also amended to require a probation report to be submitted sealed in an envelope marked "Confidential . . ." to assure compliance with statute.

Pursuant to a suggestion from the Attorney General's office, rule 35 (which was amended effective January 1, 1983), was further amended, effective July 1, 1983, to provide that in death penalty appeals, the trial judge shall not only determine proposed corrections to the transcripts, but shall also determine which corrections have sufficient potential significance to require that they be furnished to the parties in the form of copies of corrected transcript pages. All corrections shall be made on the original, which goes to the reviewing court.

1984—Rule 35(b) is amended to require reuse, in the transcript on appeal, of any daily transcript that was prepared. And rule 35(d) is amended to require that a reporter's request for an extension in a criminal appeal be first certified as necessary by the presiding judge. This function may be delegated to the court administrator.

1985—Rule 35 was amended to require the trial court clerk to certify and transmit to the reviewing court any required documents that were inadvertently omitted from the transcript.

1989—Rule 8 was repealed and rule 35 was amended to eliminate holding the record in the trial court for possible correction, except in death cases, so that the record will be sent up when complete and corrections will be handled under rule 12.

1990—The Judicial Council amended rule 35(b) to prohibit the clerk from using mail to give the reporter notice to prepare a transcript when the reporter is employed by the court and can be given the notice more directly.

Rule 35(c) was amended to have the prosecution's copy of the record on appeal in a criminal case sent directly to the Attorney General instead of to the district attorney so that the former receives it promptly. The district attorney instead will be sent a notice confirming that the record has been sent. The change affects only cases that do not involve the death penalty; in death penalty cases, both the Attorney General and the district attorney will continue to receive copies of the record.

The council amended rule 35(e) to require that the probation officer as well as the reviewing court receive a copy of any trial court order issued while an appeal is pending.

1992—See note following rule 980.4.

1993—Rules 12 and 35 are amended to minimize the need for formal augmentation when material is inadvertently omitted from the transcript. If the reporter or clerk is given notice to prepare and certify missing material under the amendment to rule 12, good practice would dictate that a copy of the notice be filed with the reviewing court.

January 1995—On recommendation of the Appellate Standing Advisory Committee, the council:

. . . (3) amended rule 35 to require a disk containing a copy of the transcript be sent to the California Appellate Project in death cases; . . .

July 1995—On the recommendation of the Appellate Standing Advisory Committee, the council amended:

. . . (3) rule 35(a) to specify a 20-day period for preparation of the clerk's transcript in noncapital appeals; . . .

1999—Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the time limit for filing a motion to correct the record in capital cases in which the trial commenced before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the reporter's transcript be delivered to the Attorney General in computer-readable form only; and (4) require that copies of the record be provided for postconviction counsel and the Habeas Corpus Resource Center.

2000—Amended rule 35 (c) requires the clerk to deliver the record on appeal to each appellant's *appellate* attorney or to each self-represented appellant instead of to "each

~~appealing defendant or to the defendant's trial attorney," as currently required. In capital cases, however, appellant's trial counsel would continue to receive the record on appeal.~~

~~Rule 36. Agreed or settled statement~~

~~(a) [Agreed statement]~~ ~~The parties may present the appeal on an agreed statement, which shall conform, as far as practicable, to the provisions of rule 6; provided, however, that within 25 days after filing of the notice of appeal an original and 3 copies of the statement shall be filed with the clerk.~~

~~(b) [Settled statement]~~ ~~If a transcription of any part of the oral proceedings cannot be obtained for any reason, the appellant, as soon as the impossibility of obtaining a transcript is discovered, may serve and file an application for permission to prepare a settled statement in place thereof. The application shall be verified and shall contain a statement of the facts or a certificate of the clerk showing that a reporter's transcript cannot be obtained. The judge shall decide the application within 5 days, and, if the showing is sufficient, shall make an order permitting the preparation of a settled statement. Thereafter the parties shall conform, as far as practicable, to the provisions of rule 7; provided, however, that the statement shall be delivered to the judge for settlement within 30 days after the making of the order, unless the time is extended by the reviewing court, and an original and 3 copies of the statement as settled shall be engrossed and filed with the clerk.~~

~~Rule 37. Briefs~~

~~(a) [Time and service]~~ ~~The appellant's opening brief shall be served and filed within 40 days after the filing of the record in the reviewing court. The respondent's brief shall be served and filed within 30 days after the filing of the appellant's opening brief. The appellant's reply brief, if any, shall be served and filed within 20 days after filing of the respondent's brief. The time for filing a brief in a criminal case shall not be extended by stipulation of the parties. Every brief of the defendant shall be served on both the district attorney and the Attorney General and, unless the defendant has expressly requested otherwise in writing, a copy shall be sent to the defendant. Counsel's signed statement that a copy of the brief was sent to the defendant or that counsel has the defendant's written request that briefs not be sent to the defendant is adequate proof thereof; the defendant's address need not be given in the statement. The People shall serve two copies of their briefs on appellate defense counsel, if appointed. All briefs shall be served on the clerk of the superior court for delivery to the judge who presided at the trial, as provided in rule 15(c).~~

~~*(Subd (a) amended effective January 1, 2002; previously amended effective July 1, 1983, July 1, 1987, January 1, 1990, and July 1, 1995.)*~~

~~**(b) [Failure to file]** If a party fails to timely file an appellant's opening brief or a respondent's brief, the reviewing court clerk must mail the notice required by rule 17, but the period specified in that notice must be 30 days.~~

~~*(Subd (b) adopted effective January 1, 2002.)*~~

~~**(c) [Form]** Briefs may be produced on a typewriter or a computer, as each is defined in rule 14, and shall conform, as far as practicable, to the rules governing briefs on appeal in civil cases.~~

~~*(Subd (c) relettered and amended effective January 1, 2002; adopted as subd (b); previously amended effective July 1, 1974, May 14, 1983, July 1, 1989, and July 1, 1996.)*~~

~~**(d) [Length]** A brief or petition for rehearing in an appeal from a judgment of death, whether produced on a typewriter or a computer, may not exceed the following limits:~~

~~(1) Appellant's opening brief ..... 280 pages~~
~~(2) Respondent's brief ..... 280 pages~~
~~(3) Reply brief ..... 140 pages~~
~~(4) Petition for rehearing ..... 70 pages~~

~~Tables and indices shall not be counted as pages for purposes of determining page limits. The Chief Justice may for good cause permit a longer brief to be filed.~~

~~A brief or petition for rehearing in an appeal in any other criminal case may not exceed 75 pages, excluding tables and indices, unless a longer brief is permitted by the presiding justice for good cause.~~

~~*(Subd (d) relettered and amended effective January 1, 2002; adopted as subd (c) effective July 1, 1989; previously amended effective July 1, 1996.)*~~

~~**(e) [Applicability of 1996 amendments]** The amendments to this rule effective July 1, 1996, apply to cases in which the appellant's opening brief is filed on or after January 1, 1997.~~

~~*(Subd (e) relettered effective January 1, 2002; adopted as subd (d) effective July 1, 1989; previously amended effective July 1, 1996.)*~~

~~*Rule 37 amended effective January 1, 2002; previously amended effective May 14, 1983, July 1, 1983, July 1, 1987, July 1, 1989, January 1, 1990, July 1, 1995, and July 1, 1996.*~~

~~**Advisory Committee Comment (2002)**~~

~~New subdivision (b) is derived from former rule 17(c).~~

Note

Subdivision (c) of rule 37, as it was in effect from July 1, 1989, until July 1, 1996, read:

"A brief or petition for rehearing in an appeal from a judgment of death may not exceed:

Appellant's opening brief.....	200 pages
Respondent's brief.....	200 pages
Reply brief.....	100 pages
Petition for rehearing.....	50 pages

"excluding tables and indices, unless a longer brief is permitted by the Chief Justice for good cause.

"A brief or petition for rehearing in an appeal in any other criminal case may not exceed 75 pages, excluding tables and indices, unless a longer brief is permitted by the presiding justice for good cause. (Subd (c) adopted effective July 1, 1989.)"

Drafter's Notes

1983 At the suggestion of the California Judges Association, rule 37(a) has been amended to incorporate the requirement already appearing in rule 16(b) that briefs be served on the trial court. This amendment restates and clarifies an existing requirement, as rule 16 already applies to briefs in criminal cases unless a contrary rule appears.

Subdivision (b) is amended to provide that there is no page limitation on briefs in criminal cases. This amendment was made effective forthwith because several Court of Appeal clerks' offices, that had not imposed a page limitation in criminal matters, requested clarification after a recent amendment to the rules governing printed briefs.

1987 The council amended rule 37(a) to require defendants' briefs to be sent to the defendants unless service is expressly waived by the defendant in writing.

1989 The council added subdivision (c) to rule 37 to limit principal briefs to 200 pages, reply briefs to 100 pages, and petitions for rehearing to 50 pages in cases involving the death venue cases[?]. The guidelines are designed to prevent disputes that have on occasion occurred between the originating and the receiving court as to responsibility for certain costs connected with the trial of a case. Among other subjects, the guidelines address costs related to jurors, court reporters, assigned judges, interpreters and translators, services and supplies, custody of the defendant, and appointed counsel.

1995 On the recommendation of the Appellate Standing Advisory Committee, the council amended:

. . . .(4) rule 37(a) to require the Attorney General to serve two copies of the People's briefs on appellate counsel for the defendant, if appointed; . . . .

1996—Rules 15, 28(e)(6), 29.3(a), (c), 37, 40, and 44(a) . . . These rules were amended concerning typography and length of briefs and accompanying explanatory matter, and page limits adjustments.

2002—See note following rule 1.

Rule 38. Voluntary dismissal of appeal

An appellant may dismiss his appeal at any time by filing an abandonment thereof, signed by him or his attorney of record. If the record has not yet been filed in the reviewing court, the abandonment shall be filed with the clerk of the superior court, and such filing shall operate to dismiss the appeal and to restore the jurisdiction of the superior court. If the record has been filed in the reviewing court, the abandonment shall be filed in that court, which may order the dismissal and immediate issuance of the remittitur. The clerk of the court in which the abandonment is filed shall immediately notify the adverse party of the filing of the abandonment or the order of dismissal. If the defendant abandons an appeal, the clerk shall notify both the district attorney and the attorney general.

Rule 39.50. Appeals in death penalty cases

(a) [General] The rules governing appeals from the superior court in other criminal cases apply to appeals from judgments rendering the penalty of death except where otherwise provided by these rules, 39.50 through 39.57.

(Subd (a) amended effective March 1, 1997.)

(b) [Interpretation] These rules 39.50 through 39.57 shall be interpreted to effectuate the intent of the Legislature, as stated in Penal Code section 190.8, subdivision (a), that the record in death penalty appeals be expeditiously certified.

(Subd (b) adopted effective March 1, 1997.)

(c) [Definition of delivery] For purposes of rules 39.50 through 39.57, if a transcript is mailed, the date of delivery is the date of mailing plus five days.

(Subd (c) adopted effective January 1, 1999.)

(d) [Extensions of time in the trial court] Wherever these rules 39.50 through 39.57 allow the trial court to grant an extension of the time limits specified in these rules, the court may consider the policies and factors contained in rule 45.5, to the extent they are applicable.

(Subd (d) amended effective January 1, 1999; adopted as subd (c) effective March 1, 1997.)

(e) [Notification by clerk] The clerk of the superior court shall, forthwith upon its rendition, mail certified copies of the judgment imposing the penalty of death to the Clerk of the Supreme Court and to the Attorney General.

(Subd (e) relettered effective January 1, 1999; previously relettered as subd (d) effective March 1, 1997; adopted effective January 1, 1983, as subd (b).)

Rule 39.50 amended effective January 1, 1999; adopted effective March 1, 1997.

Former Rules

Former rule 39.5 was amended and renumbered effective March 1, 1997, as rules 39.50 and 39.51.

Drafter's Notes

1999 Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the time limit for filing a motion to correct the record in capital cases in which the trial commenced before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the reporter's transcript be delivered to the Attorney General in computer-readable form only; and (4) require that copies of the record be provided for postconviction counsel and the Habeas Corpus Resource Center.

Rule 39.51. Record in death penalty cases

(a) [Contents of record] When a judgment of death has been rendered, the entire record, consisting of a clerk's transcript and a reporter's transcript, shall be prepared.

(1) *(Clerk's transcript)* The clerk's transcript shall include all documents filed or lodged in the municipal and superior court files in the case, including all items listed in rule 33(a) and juror questionnaires of all potential jurors, regardless of whether the jurors were selected to sit on the case.

(2) *(Reporter's transcript)* The reporter's transcript shall include transcripts of all oral proceedings in the municipal and superior courts in the case, including transcripts of prior proceedings in the same case that did not result in a verdict or the death penalty because of a mistrial or an order granting a new trial.

(Subd (a) amended effective March 1, 1997; adopted as subd (c) of rule 39.5 effective January 1, 1983.)

(b) [Confidential transcripts] All documents filed confidentially under Penal Code section 987.9 or 987.2 shall be sealed and copies provided only to the reviewing court and to counsel for the defendant to whom the documents relate. All transcripts of in camera proceedings shall be sealed and copies

provided only to the reviewing court and to counsel for those parties present at the proceedings.

(Subd (b) amended effective July 1, 2001.)

(c) [Additional material] This rule does not affect the power of the Supreme Court or superior court to order inclusion of additional matter.

Rule 39.51 amended effective July 1, 2001; adopted effective March 1, 1997.

Rule 39.52. Preparation and certification of transcripts of preliminary proceedings in death penalty cases

(a) [Application] This rule applies to capital cases in the superior court, addressing the preparation and certification of transcripts of oral proceedings in a capital case prior to and including the preliminary hearing. Those transcripts must be prepared and certified in accordance with Penal Code section 190.9(a) and the following procedures.

(Subd (a) amended effective January 1, 2002.)

(b) [Notice to prepare record] Upon receiving notification from the prosecution that the death penalty is being sought, the responsible superior court judge must enter that information on the record and notify the presiding judge and clerk of the court.

(1) The responsible superior court judge is the judge assigned to try the case or, if none has been assigned, the presiding judge or a designee of the presiding judge.

(2) Notification from the prosecution to the superior court is deemed to have been given, for the purposes of this rule only, 60 days before the first date set for trial on a charge that may result in the death penalty unless the prosecution has previously given notice that it does not intend to seek the death penalty.

(Subd (b) amended effective January 1, 2002.)

(c) [Assignment of judge] Within five days of receiving notification from the responsible superior court judge that the death penalty is being sought, the presiding judge must assign to the judge who presided at the preliminary hearing the responsibility for preparation of the record of all proceedings prior to and including the preliminary hearing in that case.

(Subd (c) amended effective January 1, 2002.)

(d) [Notice to prepare transcripts; designation of primary reporter] Within five days of receiving notice that the death penalty is being sought, the clerk must notify each and every court reporter who has reported any hearing, conference, or proceeding prior to and including the preliminary hearing, whether in chambers or in open court, in the case. If there has been more than one reporter, the judge who presided at the preliminary hearing may assign one reporter or other designee to perform the functions of the primary reporter as specified in rule 9(f).

(Subd (d) amended effective January 1, 2002.)

(e) [Preparation and number of copies] Each reporter must prepare an original transcript and five paper copies of the proceedings in the manner and form required by rule 9, and two additional copies for each co-defendant against whom the prosecution is seeking the death penalty. A certificate attesting that the transcript is correct must be attached to each original and each paper copy.

This subdivision requires preparation of the transcript of the preliminary hearing unless that transcript has already been filed with the superior court for the purpose of including it in the superior court clerk's transcript.

(Subd (e) amended effective January 1, 2002.)

(f) [Delivery of reporter's transcript] Within 20 days of notification by the clerk to prepare the reporter's transcript, the primary reporter or other designee, if one has been designated pursuant to subdivision (d), must deliver the original and all copies to the clerk Within five days of receipt of the reporter's transcripts, the clerk must deliver the original of the reporter's transcript to the designated judge responsible for preparation of the record in the case, one copy to each defendant or, if the defendant is represented by counsel, to his or her trial attorney, and one copy to the prosecuting attorney. Confidential transcripts must be sealed and copies provided only to counsel for those parties who were present at the confidential proceeding.

(Subd (f) amended effective January 1, 2002.)

(g) [Review by counsel] To determine whether to file a request for corrections or for additional transcripts or documents, trial counsel must perform the tasks listed in paragraphs (g)(1) through (g)(4). If a different attorney represented the defendant prior to or at the preliminary hearing, trial counsel must perform those tasks to the best of his or her ability and the attorney who appeared at the preliminary hearing must also perform those tasks.

(1) Review the docket sheets to ensure that transcripts of all proceedings have been made;

(2) Examine the court file to determine whether it is complete;

~~(3) Review the reporter's transcript; and~~

~~(4) Consult with opposing counsel to determine whether all other discussions have been properly transcribed.~~

~~*(Subd (g) amended effective January 1, 2002; previously amended effective January 1, 1999.)*~~

~~**(h) [Declaration and request for corrections and additional transcripts]** No later than 30 days after delivery of the transcripts, counsel for the prosecution and for the defense must each file with the court one of the following:~~

~~(1) A declaration stating that he or she has performed the tasks required by subdivision (g) of this rule, or that they have been performed under counsel's supervision. If trial counsel did not represent the defendant at the preliminary hearing, the attorney who represented the defendant at the preliminary hearing must also file a declaration stating whether he or she performed the tasks required by subdivision (g);~~

~~(2) A declaration as described in paragraph (h)(1) and a request for corrections of or additions to the reporter's transcript or the court file; or~~

~~(3) A request for extension of time to file the declaration and request.~~

~~*(Subd (h) amended effective January 1, 2002; previously amended effective January 1, 1999.)*~~

~~**(i) [Certification]** If any counsel fails to file the declaration or request for extension of time as required by subdivision (h) of this rule, the court must not certify the record and must use all reasonable means to ensure compliance with this rule. The court must set the matter for a hearing, require the attorney to show cause why he or she has not complied with the rule, and set a date for the attorney to comply. If a declaration is filed without a request for corrections or additions, the designated judge must certify the record of the proceedings prior to and including the preliminary hearing as complete and correct. If one or more requests for corrections or additions are filed, the following procedures must be followed:~~

~~(1) The designated judge must hold a hearing within 15 days of the filing of the request and must make a determination on all requests.~~

~~(2) The original reporter's transcript must be corrected to reflect all corrections ordered. All corrections must be furnished to the parties in the form of copies of corrected transcript pages.~~

~~(3) The corrected and additional transcripts and documents must be delivered to the designated judge no later than 20 days after the hearing.~~

~~(4) The court may order further proceedings for correcting or completing the record as needed.~~

~~(5) When the court's order has been satisfied, the judge must certify that the objections have been properly corrected and must notify the reporter to prepare the corrected transcripts.~~

~~(6) Once the reporter has been notified to prepare the corrected transcripts under subdivision (i)(5), within 20 days he or she must also provide six computer-readable copies of the corrected transcript, conforming to the requirements of Code of Civil Procedure section 269(c) and rule 35(b), and an additional computer-readable copy for each co-defendant against whom the prosecution is seeking the death penalty, each labeled to show the date on which the computer-readable copy was made.~~

~~*(Subd (i) amended effective January 1, 2002; previously amended effective January 1, 1999.)*~~

~~**(j) [Delivery to superior court]** No later than five days after the record has been certified, the clerk must deliver to the responsible superior court judge for inclusion in the superior court record:~~

~~(1) The corrected and certified original reporter's transcript and those copies that have not been distributed to counsel, including the computer-readable copies, and~~

~~(2) The court file or a certified copy of the court file.~~

~~*(Subd (j) amended effective January 1, 2002.)*~~

~~**(k) [Notice that death penalty is no longer being sought]** If at any time the death penalty is no longer sought or available in a case in which the presiding judge of the superior court has ordered preparation of the record, the superior court clerk must promptly notify the reporters that the requirements under this rule no longer apply.~~

~~*(Subd (k) amended effective January 1, 2002.)*~~

~~**(l) [Extension of time]** The court may extend any of the time periods specified by this rule for good cause only, but may not extend the 120-day period specified in Penal Code section 190.9(a)(2) for delivery of the record to the responsible superior court judge.~~

~~(1) The court may request an extension of the 120-day period for delivery of the record by presenting to the responsible superior court judge a~~

declaration containing a specific statement of reasons the time limits cannot be met.

(2) The responsible superior court judge may not extend the time for more than an aggregate of 90 days except in an exceptional case. If the court extends the time for more than 90 days, it must state on the record its specific reasons for doing so.

(Subd (l) amended effective January 1, 2002.)

Rule 39.52 amended effective January 1, 2002; adopted effective March 1, 1997; previously amended effective January 1, 1999.

Drafter's Notes:

2002 The rule has been amended to implement revisions made necessary by unification of the courts.

Rule 39.53. Preparation of the record in death penalty cases

(a) [Cases commenced prior to January 1, 1997] In cases in which the trial commenced prior to January 1, 1997, the time limits for preparation and certification of the record are those specified in rule 35. For purposes of computing time for preparation of the record, the notice of appeal shall be deemed to have been filed at the time of rendition of the judgment.

(Subd (a) amended effective January 1, 1999; previously amended effective March 1, 1997.)

(b) [Cases commenced on or after January 1, 1997] In cases in which the trial commenced on or after January 1, 1997, the record shall be prepared in accordance with Penal Code section 190.8 and the following procedures:

(1) *(Preparation of clerk's transcript)* Upon the entry of a judgment of death, the superior court clerk shall prepare an original and eight copies of the clerk's transcript, in the manner and form required by rule 9. The clerk's transcript shall include the contents of the municipal court file. The clerk shall append to the original and each copy a certificate that it is correct. When more than one co-defendant is sentenced to death, the clerk shall prepare two copies for each additional co-defendant sentenced to death.

(2) *(Notice to prepare reporter's transcript)* The clerk, promptly upon the entry of a judgment of death, and in any event within five days after entry of the judgment, shall notify the reporter. The notice shall be delivered to the reporter personally or to his or her office or internal mail receptacle; if the reporter is not employed by the court, the notice may be mailed.

(3) *(Preparation and number of copies)* The reporter shall prepare an original and five clearly legible copies of the reporter's transcript and two additional copies for each additional co-defendant sentenced to death, in the manner and form required by rule 9. A certificate that the document is correct shall be attached to the original and to each copy. Portions of the transcript that were prepared during the trial shall not be retyped unless necessary to correct errors. These portions shall be renumbered and bound together with transcripts of any portions of the proceedings not previously transcribed. If additional copies are needed, they shall be prepared by photocopying or an equivalent process and not by retyping.

(4) *(Delivery)* The primary reporter shall deliver the original and all copies to the clerk. The clerk shall deliver one paper copy of the clerk's transcript and the reporter's transcript each to the prosecuting attorney and to the attorney who represented the defendant at the trial, no later than the 30-day deadline mandated by Penal Code section 190.8(b). The clerk shall retain the original transcript and the remaining copies.

(5) *(Extension of time for preparation of the clerk's or reporter's transcript)* The superior court may grant an extension of the 30-day deadline for preparation of the transcripts mandated by Penal Code section 190.8(b) upon request of the clerk or a reporter for good cause only, for up to 30 additional days only. Any further extension of time may be granted only by the Supreme Court.

(6) *(Request for extension of time)* The clerk or reporter shall request an extension by presenting to the superior court or the Supreme Court a declaration containing a specific statement of reasons the time limits cannot be met. Good cause may be presumed in cases in which the clerk's and reporter's transcripts combined exceed 10,000 pages.

(7) *(Order extending time)* If the superior court grants an extension of time for preparation of the record, it shall state in a written order the specific reasons that justify the extension. A copy of the order shall be promptly delivered to the Supreme Court.

(Subd (b) amended effective January 1, 1999; adopted effective March 1, 1997.)

Rule 39.53 amended effective January 1, 1999; adopted effective March 1, 1997.

Drafter's Notes

1999—Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the time limit for filing a motion to correct the record in capital cases in which the trial commenced before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the reporter's transcript be delivered to the Attorney

~~General in computer-readable form only; and (4) require that copies of the record be provided for postconviction counsel and the Habeas Corpus Resource Center.~~

~~Rule 39.54. Certification of record for completeness in death penalty cases~~

~~(a) [General]~~ ~~In death penalty cases in which the trial commenced after January 1, 1997, the trial court shall certify the record for completeness in accordance with Penal Code section 190.8 and this rule.~~

~~(b) [Review of record by trial attorneys]~~ ~~Both the defense attorney and the prosecuting attorney shall review the docket sheets and minute orders to determine whether the reporter's transcript is complete, and shall review the superior court file to determine whether the clerk's transcript is complete.~~

~~(c) [Declaration and request for additions or corrections]~~ ~~No later than 30 days after delivery of the transcripts to counsel, the prosecuting attorney and the defense attorney shall each file with the superior court one of the following:~~

~~(1) A declaration stating that he or she has performed the tasks required by subdivision (b) of this rule or that they have been performed under counsel's supervision;~~

~~(2) A declaration as described in paragraph (c)(1) and a request for any additional materials to be included in the record and any corrections of errors that have come to the attorney's attention. A request for additional reporter's transcripts shall state the nature and date of the proceedings and the name of the reporter who transcribed them; or~~

~~(3) A request for extension of time to file the declaration and requests, in accordance with subdivisions (g) and (h).~~

~~*(Subd (c) amended effective January 1, 1999.)*~~

~~(d) [Hearings on completion of record]~~ ~~If a request for additional materials or for corrections is filed, the clerk shall deliver the original transcript to the judge who presided over the trial. A determination on the request shall be made as follows:~~

~~(1) No later than 15 days after the filing of the declaration and any request described in subdivision (c), the trial court shall conduct a hearing pursuant to Penal Code section 190.8(e) to address the completeness and accuracy of the record. The trial court shall determine whether the requested corrections shall be made.~~

~~(2) The trial court shall order any additional transcripts or corrections to be prepared within 10 days of the date of the order. The clerk shall~~

promptly, and in any event within five days, notify the reporter of the court's order. If a transcript of any part of the oral proceedings cannot be obtained, the court may make an order permitting the preparation of a settled statement in accordance with rule 36.

(3) The corrections ordered shall be furnished to the parties in the form of copies of corrected transcript pages. The original transcripts shall be corrected to reflect all corrections ordered.

(4) The trial court shall set another hearing within five days after the date on which the additional or corrected transcripts are filed. At that hearing, the court shall determine whether the record has been completed in accordance with its previous order and shall order further proceedings for correction or completion of the record as needed.

(Subd (d) amended effective May 16, 1997; adopted effective March 1, 1997.)

(e) [Certification] If any counsel fails to file the declaration or request for extension of time as required by subdivision (c) of this rule, the court shall not certify the record and shall use all reasonable means to ensure compliance with this rule. The court shall set the matter for a hearing, require the attorney to show cause why he or she has not complied with the rule, and, at the hearing, set a date for the attorney to comply. If a declaration is filed without a request for corrections or additions, or when the record has been completed and corrected in accordance with the court's order, the court shall certify the record as complete and shall redeliver the transcripts to the clerk. The record shall be certified as complete within 90 days of the imposition of the death sentence, as required by Penal Code section 190.8(d).

(Subd (e) amended effective January 1, 1999.)

(f) [Preparation of computer-readable copies] Upon certification of the record as complete, the clerk shall promptly notify the reporter to prepare five computer-readable copies of the transcript, plus an additional computer-readable copy for each additional co-defendant who has been sentenced to death. The computer-readable copies shall conform to the requirements of Code of Civil Procedure section 269(c) and rule 35(b) and shall be labeled to show the date on which they were made. The computer-readable copies shall contain the identical volume divisions, pagination, line numbering, and text of the original paper transcript as corrected and certified as complete. Each transcript of a confidential proceeding shall be placed on a separate disk and clearly labeled as confidential. The reporter shall deliver the computer-readable copies of the transcript no later than 10 days after the date the clerk gives notice of certification.

(Subd (f) amended effective January 1, 1999.)

(g) [Extension of time] The trial court may extend the time for review of the record and filing the documents required by subdivisions (b) and (c), or any of the time periods specified in subdivision (d), (e), or (f) for good cause. In cases in which the clerk's and reporter's transcripts combined contain more than 10,000 pages, the court may grant an additional three days for every 1,000 pages of combined transcript for counsel to review the records as required by subdivisions (b) and (c).

(h) [Request for extension of time] Any request for extension of time for review of the record shall be filed in writing before the expiration of the 30-day deadline.

(i) [Order granting extension of time] If the court grants any extension of time or extends the time for certification of the record on its own motion, the court shall state the specific reasons that justify the extension in a written order. A copy of the order shall be promptly transmitted to the Supreme Court.

(j) [Delivery] When the record has been certified as complete, the clerk shall deliver the record and note the dates of the deliveries, as follows:

(1) One paper copy of the entire record and one computer-readable copy of the reporter's transcript to each defendant's appellate attorney and each defendant's postconviction attorney. If counsel has not been retained or appointed for a defendant, the clerk shall retain appellate and postconviction counsel's copies of the record until counsel have been retained or appointed; and

(2) One paper copy of the clerk's transcript and one computer-readable copy of the reporter's transcript to the Attorney General, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco.

(Subd (j) amended effective January 1, 1999.)

(k) [Notice of delivery] When the record is delivered to defendant's appellate counsel, the clerk of the superior court shall serve notice of delivery upon the Clerk of the Supreme Court.

Rule 39.54 amended effective January 1, 1999; adopted effective March 1, 1997.

Drafter's Notes

1999 Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the time limit for filing a motion to correct the record in capital cases in which the trial commenced before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the reporter's transcript be delivered to the Attorney General in computer-readable form only; and (4) require that copies of the record be provided for postconviction counsel and the Habeas Corpus Resource Center.

~~Rule 39.55. Certification of record for accuracy in death penalty cases~~

~~(a) [General]~~ ~~In death penalty cases in which the trial was commenced on or after January 1, 1997, the record shall be certified for accuracy in accordance with Penal Code section 190.8(g) and this rule.~~

~~(b) [Request for corrections and additions by appellate counsel]~~ ~~Appellate counsel shall file any request for corrections or additional transcripts no later than 90 days after the delivery of the record on appeal to the defendant's appellate counsel. Any request for additional reporter's transcripts shall state the nature and date of the proceedings and the name of the reporter.~~

~~(c) [Hearing on request]~~ ~~If a request is filed, the clerk shall deliver the original transcript to the trial judge. No later than 15 days after the filing of any request described in subdivision (b), the trial court shall conduct a hearing pursuant to Penal Code section 190.8(e) to address the completeness and accuracy of the record, in accordance with the procedures and timelines set out in rule 39.54(d).~~

~~(d) [Certification]~~ ~~If no request for corrections or for additional transcripts is made, or when the record has been completed and corrected in accordance with the court's order, the court shall certify the record as accurate and shall redeliver the record to the clerk. The record shall be certified as accurate within 120 days after it has been delivered to appellate counsel, as required by Penal Code section 190.8(g).~~

~~(e) [Preparation of computer-readable copies]~~ ~~Upon certification of the record as accurate, the clerk shall promptly notify the reporter to prepare six corrected computer-readable copies of the transcript, plus an additional computer-readable copy for each additional co-defendant who has been sentenced to death. The computer-readable copies shall conform to the requirements of Code of Civil Procedure section 269(c) and rule 35(b) and shall be labeled to show the date on which they were made. The computer-readable copies shall contain the identical volume divisions, pagination, line numbering, and text of the original paper transcript as corrected and certified as accurate. Each transcript of a confidential proceeding shall be placed on a separate disk and clearly labeled as confidential. The reporter shall deliver the computer-readable copies of the transcript within 10 days after the date the clerk gives notice of certification.~~

~~(Subd (e) amended effective January 1, 1999; previously amended effective May 16, 1997; adopted effective March 1, 1997.)~~

~~(f) [Extension of time]~~ ~~The trial court may extend the time for filing a request for corrections or additions under subdivision (b) and any of the time periods specified in subdivision (c), (d), or (e) for good cause.~~

(g) [Request for extension of time to request corrections] Any request for extension of time to request correction of the record or additional records must be filed in writing before the expiration of the 90-day deadline. In cases in which the clerk's and reporter's transcripts combined contain more than 10,000 pages, the court may grant an additional 15 days for every 1,000 pages of combined transcript over 10,000 pages for counsel to file a request for corrections or additional transcripts.

(h) [Order extending time] If the court grants any extension of time or extends the time for certification of the record on its own motion, the court shall state the specific reasons that justify the extension in a written order. A copy of the order shall be promptly transmitted to the Supreme Court. In any case in which the trial court has granted an extension of time, it may conduct a status conference or require a written status report 90 days after the delivery of the record to defendant's appellate attorney, or at some other reasonable time, so that the attorney may report on the progress made in reviewing the record.

Rule 39.55 amended effective January 1, 1999; adopted effective March 1, 1997.

Drafter's Notes

1999 Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the time limit for filing a motion to correct the record in capital cases in which the trial commenced before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the reporter's transcript be delivered to the Attorney General in computer-readable form only; and (4) require that copies of the record be provided for postconviction counsel and the Habeas Corpus Resource Center.

Rule 39.56. Transmission of record in death penalty cases

When the record has been certified as accurate in accordance with rule 39.55(d), the clerk shall transmit the record as follows:

(1) To the Clerk of the Supreme Court, the original record and one computer-readable copy of the reporter's transcript;

(2) To the Attorney General, the Habeas Corpus Resource Center, and the California Appellate Project, (i) a notice enumerating all corrections ordered and stating a date of certification, (ii) copies of any corrected pages of the clerk's transcript, and (iii) a corrected computer-readable copy of the reporter's transcript;

(3) To the defendant's appellate counsel and postconviction counsel, (i) a notice enumerating all corrections ordered and stating a date of certification, (ii) copies of any corrected pages of the clerk's and reporter's transcripts, and (iii) a corrected computer-readable copy of the reporter's transcript; and

(4) To the Governor, the copies of the record required by Penal Code section 1218, with copies of pages containing corrections inserted, and with a copy of the notice of corrections.

Rule 39.56 amended effective January 1, 1999; adopted effective March 1, 1997.

Drafter's Notes

1999—Rules 33, 35, 39.50, 39.52, 39.53, 39.54, 39.55, and 39.56 were amended to (1) change the time limit for filing a motion to correct the record in capital cases in which the trial commenced before January 1, 1997; (2) make clarifying changes in the rules on record preparation applicable to cases in which the trial commenced after January 1, 1997; (3) require that one copy of the reporter's transcript be delivered to the Attorney General in computer-readable form only; and (4) require that copies of the record be provided for postconviction counsel and the Habeas Corpus Resource Center.

Rule 39.57. Time for filing briefs in death penalty cases

(a) [Application] This rule applies to death penalty cases in which the trial commenced on or after January 1, 1997.

(Subd (a) amended effective July 1, 2000.)

(b) [Appellant's opening brief] Once the record is certified for completeness or the clerk delivers the completed record to appellate counsel, whichever is later, the Clerk of the Supreme Court shall notify appellant's counsel and the Attorney General of the due date for the appellant's opening brief. If the clerk's and reporter's transcripts combined contain 10,000 pages or fewer, appellant's opening brief shall be filed no later than 210 days after the certification of the record for completeness or after appellant's counsel receives a copy of the completed record, whichever is later, as mandated by Penal Code section 190.6(b). If the clerk's and reporter's transcripts combined contain more than 10,000 pages, the time for filing appellant's opening brief shall be automatically extended by 15 days for each 1,000 pages of combined transcript over 10,000 pages.

(c) [Respondent's brief] Upon the filing of the appellant's opening brief, the Clerk of the Supreme Court shall notify the Attorney General of the due date for respondent's brief. If the clerk's and reporter's transcripts combined contain 10,000 pages or fewer, respondent's brief shall be filed no later than 120 days after the date that appellant's opening brief was filed. If the clerk's and reporter's transcripts combined contain more than 10,000 pages, the time for filing respondent's brief shall be automatically extended by 15 days for each 1,000 pages of combined transcript over 10,000 pages.

(d) [Appellant's reply brief] Appellant may file a reply brief no later than 60 days after the date that respondent's brief was filed.

(e) [Extension of time] Extension of time to file a brief may be granted by the Supreme Court for good cause, in accordance with the policies and factors contained in rule 45.5, to the extent they are applicable.

Rule 39.57 amended effective July 1, 2000; adopted effective March 1, 1997.

Drafter's Notes

July 2000 – Rule 39.57 was amended to apply to all capital cases in which trial commenced on or after January 1, 1997.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
1.	Gen'l	Directors of the appellate projects for the First, Second, Fourth, and Sixth Districts	Y	Approve of separating criminal from civil rules and of "the effort to conform the rules to actual practice, and to take account of practical considerations."	No response necessary.
2.	Gen'l	Robert R. Anderson Chief Asst. Attorney General	Y	Agrees with all the proposed rules.	No response necessary.
3.	Gen'l	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	Generally agrees with all the proposed rules, and "particularly commend[s] the decision to make the rules governing criminal appeals self-contained."	No response necessary.
4.	Gen'l	Harry R. Sheppard Presiding Justice Alameda Superior Court	N	Approves of separating criminal from civil rules.	No response necessary.
5.	Gen'l	Bonnie Armstrong Vista, CA	N	Agrees with all the proposed rules.	No response necessary.
6.	30	Directors of the appellate projects for the First, Second, Fourth, and Sixth Districts	Y	Add a provision to revised rule 30 requiring the superior court clerk to "make available" to appellants any notice of appeal form approved by the Court of Appeal for the district, or, if none, the form approved by the Judicial Council for statewide use.	The proposal is beyond the scope of this rules revision project. The appropriate committees of the Judicial Council will consider whether to revise the statewide form to incorporate useful features of the local forms and how to ensure that appellants are made aware of the statewide form.
7.	30	Rules and Forms Com. Orange Superior Court	Y	The commentators object to including two types of misdemeanor convictions (revised rule 30(a)(2)(B)–(C))	Disagree. This is not a substantive change. It is settled case law that an

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				in the definition of "felony case" for purposes of the right to appeal to the Court of Appeal. The commentators contend this change violates both the equal protection guarantee and statutory intent (see Pen. Code, §§ 1235(b) [appeal in a "felony case" is to the Court of Appeal], 1466 [appeal in a misdemeanor case is to the appellate division of the superior court]).	appeal is taken to the Court of Appeal not only when the defendant is charged with and convicted of a felony, but also when the defendant is charged with both a felony and a misdemeanor (Pen. Code, § 691, subd. (f)) but is convicted of only the misdemeanor (e.g., *People v. Brown* (1970) 10 Cal.App.3d 169); when the defendant is charged with a felony but is convicted of only a lesser offense (Pen. Code, § 1159; e.g., *People v. Spreckels* (1954) 125 Cal.App.2d 507); and when the defendant is charged with an offense filed as a felony but punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a misdemeanor under Penal Code section 17, subdivision (b) (e.g., *People v. Douglas* (1999) 20 Cal. 4th 85; *People v. Clark* (1971) 17 Cal.App.3d 890). Trial court unification did not change this rule: after as before unification, "Appeals in felony cases lie to the [C]ourt of [A]ppeal, regardless of whether the appeal is from the superior court, the municipal court, or the action of a magistrate. *Cf.* Cal. Const. art. VI, § 11(a) [except in death penalty cases, Courts of Appeal have appellate jurisdiction when superior courts have original jurisdiction 'in causes of a type

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
					within the appellate jurisdiction of the [C]ourts of [A]ppeal on June 30, 1995 . . . .']." (Recommendation on Trial Court Unification (July 1998) 28 Cal. Law Revision Com. Rep. (1998) pp. 455–456.)
8.	30	Gloria Barnes Legal Process Clerk Santa Cruz Superior Court	N	To include crimes punishable as a felony or a misdemeanor in the definition of "felony case" in revised rule 30(a)(2) will increase the number of misdemeanor appeals to the Court of Appeal.	Disagree. See response to comment 7.
9.	30	Maurice H. Oppenheim Attorney at Law	N	1. An infraction should not be included as a "lesser offense" in the definition of "felony offense" in revised rule 30(a)(2)(B).	Disagree. See response to comment 7.
10.	30	Judge James Morris Sacramento Superior Court	N	Delete the word "included" from "lesser included offense" in revised rule 30(a)(2) to clarify that the definition also reaches "lesser related offenses."	Agree. The word has been deleted.
11.	30	Hannah Inouye Manager, Appeals Division Los Angeles Superior Court	Y	Revised rule 30(a)(2)(C) should make it clear that "felony case" does not include an offense punishable as a felony or misdemeanor but filed by complaint as a misdemeanor only.	Agree. Revised rule 30(a)(2)(C) now clarifies that it applies only to such an offense if it is "filed as a felony."
12.	30	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. Add a sentence to subdivision (a) of revised rule 30 (notice of appeal generally) describing the subject matter of subdivision (b) (guilty plea appeal), to make sure the novice reader goes beyond subdivision (a). 2. In revised rule 30(a)(2)(C), as proposed, delete "a misdemeanor or infraction as a lesser included offense"	1. Agree. The sentence has been added. 2. Agree. The substitution has been made (see revised rule 30(a)(2)(B)).

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				and substitute "a lesser offense."	
				3. In revised rule 30(a)(2)(D), as proposed, delete "and the judgment imposes a misdemeanor punishment."	3. Agree. The provision has been rewritten (see revised rule 30(a)(2)(C)).
				4. Insert a warning cross-reference ("except as provided in (b)") into revised rule 33(a)(4), to alert practitioners unfamiliar with the complications of guilty plea appeals.	4. Agree. The cross-reference has been added.
				5. Add a provision to revised rule 30 requiring the superior court clerk to "make available" to appellants any notice of appeal form approved by the Court of Appeal for the district, or, if none, the form approved by the Judicial Council for statewide use.	5. Disagree. See response to comment 6, above.
				6. The provisions of revised rule 30(b) governing guilty plea appeals are well conceived in requiring both a notice of appeal and a certificate of probable cause.	6. No response necessary.
				7. For completeness, add to the heading of subdivision (b) of revised rule 30: "or after admission of probation violation."	7. Agree. The proposed words have been added.
				8. Rephrase subdivision (b)(1) of revised rule 30 to make it clear that a certificate of probable cause is an essential prerequisite to making a pure certificate appeal *operative*, thus distinguishing "mixed appeal" cases in which the appeal is already operative because the notice of appeal stated a noncertificate claim and in which a certificate of probable cause is needed only to make certificate claims *cognizable.*	8. Disagree. The proposed wording distracts the user from the purpose of subdivision (b)(1), which is to inform the user how to appeal from this type of judgment. The information sought to be conveyed by the proposed wording is better conveyed elsewhere (see new subdivision (b)(5)).
				9. Rephrase subdivision (b)(2) of revised rule 30 to make	9. Disagree. The proposed revised

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				clear that a guilty plea appeal will still be *operative* without a certificate of probable cause if it is based on noncertificate grounds. 10. Insert a new paragraph in subdivision (b) of revised rule 30 warning the appellant that although a guilty plea appeal is operative without a certificate of probable cause if the notice of appeal complies with subdivision (b)(2) (now subd. (b)(4)), no issue challenging the validity of the plea is cognizable on that appeal without a certificate of probable cause. 11. As proposed, paragraph (4) of revised rule 30(b) stated that "The appeal will not be operative as to any ground for which a certificate [of probable cause] is denied." The commentator points out that the provision is inconsistent with *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1177-1180, and should therefore be deleted.	subdivision (now (b)(4)) clearly implies the point. 10. Agree. The proposed provision has been inserted as new subdivision (b)(5) of revised rule 30. 11. Agree. The provision has been deleted.
13.	30	Directors of the appellate projects for the First, Second, Fourth, and Sixth Districts	Y	As proposed, paragraph (4) of revised rule 30(b) is inconsistent with *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1177-1180, and should therefore be deleted.	Agree. The provision has been deleted.
14.	30	Maurice H. Oppenheim Attorney at Law	N	The commentator suggests adding in par. (3) of revised rule 30(b) (now par. (2)) [within 20 days, trial judge must file either a certificate of probable cause or an order denying same] a sentence saying "A certificate of probable cause may include an order denying the certificate *as to any ground.*"	Disagree. The suggestion seeks to implement proposed paragraph (4) of revised rule 30(b), but that paragraph has now been deleted (see response to comment 12.11.)
15.	30	Eric Walden	N	As proposed, paragraph (4) of revised rule 30(b) is	Agree. The provision has been deleted.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
		Supervising Writ Attorney Court of Appeal, 5th Dist.		inconsistent with *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1177-1180, and should therefore be deleted.	
16.	30	Jody L. Isenberg Cal. Judicial Attorneys Assn.	Y	As proposed, paragraph (4) of revised rule 30(b) is inconsistent with *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1177-1180, and should therefore be deleted.	Agree. The provision has been deleted.
17.	30	Tressa S. Kentner Court Executive Officer San Bernardino Superior Court	N	As proposed, paragraph (4) of revised rule 30(b) is inconsistent with *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1177-1180, and should therefore be deleted.	Agree. The provision has been deleted.
18.	30	Jonathan P. Milberg Cal. Appellate Defense Counsel	Y	As proposed, paragraph (4) of revised rule 30(b) is inconsistent with *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1177-1180, and should therefore be deleted.	Agree. The provision has been deleted.
19.	30	Appellate Courts Com. State Bar of California	Y	As proposed, paragraph (4) of revised rule 30(b) is inconsistent with *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1177-1180, and should therefore be deleted.	Agree. The provision has been deleted.
20.	30	Arthur G. Scotland Presiding Justice Court of Appeal, 3d Dist.	Y	1. As proposed, paragraph (4) of revised rule 30(b) is inconsistent with *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1177-1180, and should therefore be deleted. 2. As proposed, paragraph (5) of revised rule 30(b) states that "The time to prepare, certify, and file the record, or to file an agreed or settled statement, begins *when the court files the certificate.*" On its face, therefore, the paragraph applies only to certificate appeals. But in former rule 31(d), the provision stated more broadly that the time to prepare, etc. "begins *when the appeal becomes operative.*" Thus the former rule applied on its	1. Agree. The provision has been deleted. 2. Disagree. Once a guilty plea appeal qualifies as a noncertificate appeal, it is governed by the general terms of revised rule 30(a) rather than the special terms of revised rule 30(b). A noncertificate appeal is automatically "operative" the moment the defendant files a notice of appeal under revised

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				face both to certificate appeals and to noncertificate appeals after guilty pleas. The commentator asserts that the revised version does not specify when the time begins to run in noncertificate appeals.	rule 30(b)(4). The questioned provision is appropriate to certificate appeals, however, because the judge has 20 days in which to decide whether or not to sign and file a certificate of probable cause; the preparation of the record should await that event, because it will be unnecessary if the judge denies that certificate.
21.	30	Eve Sproule Cal. Assn. of Appellate Court Clerks	Y	1. As proposed, paragraph (5) of revised rule 30(b) states that "The time to prepare, certify, and file the record, or to file an agreed or settled statement, begins *when the court files the certificate.*" On its face, therefore, the paragraph applies only to certificate appeals. But in former rule 31(d), the provision stated more broadly that the time to prepare, etc. "begins *when the appeal becomes operative.*" Thus the former rule applied on its face both to certificate appeals and to noncertificate appeals after guilty pleas. The commentator asserts that the revised version does not specify when the time begins to run in noncertificate appeals. 2. The commentator raises the question whether proposed paragraph (5) of revised rule 30(b) would be more appropriate in a rule on preparing the record than in a rule on taking the appeal.	1. Disagree. See response to comment 20.2. 2. Agree. The provision has been moved to new subdivision (b) of revised rule 32.
22.	30	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. In revised rule 30(c)(1), the clerk's duty to give notice when a notice of appeal is filed should be qualified in certificate appeals so that the duty does not arise until the appeal becomes operative by issuance of a certificate of probable cause. This would promote economy because it	1. Agree. A second sentence has been added to subdivision (c)(1) so providing.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				would permit the clerk to defer giving notice until it is certain the appeal will in fact be allowed to proceed. 2. To implement the change suggested in the preceding comment, add a requirement that the clerk's notice also show the date any certificate of probable cause was filed. 3. Revised rule 30(c)(3) requires the clerk's notice to include a copy of the list of reporters under rule 980.4 and any certificate of probable cause. The commentator suggests including also a copy of the notice of appeal, explaining that the notice of appeal often includes information critical for processing the appeal in the reviewing court and in the district's appellate project, for expediting appointment of counsel, and for "spotting potential problems in the notice of appeal that need to be addressed promptly." 4. Add the following words to clarify which mailing is referred to in revised rule 30(c)(5): "The mailing of a notification under (1) <u>to the attorney of record in the superior court</u> is a sufficient performance of the clerk's duty despite the discharge [etc.]. . . of the attorney."	2. Agree. The requirement has been added to revised rule 30(c)(2). 3. Agree. Revised rule 30(c)(3) has been rewritten to require that the notice of appeal be included in the clerk's notice. 4. Disagree. Wording identical to revised rule 30(c)(5) is used in the corresponding civil rule (rule 1(d)(4)), and it does not appear to cause any confusion.
23.	30	Arnella Sims Los Angeles County Court Reporters Assn.	Y	1. Revised rule 30(c)(1) requires the clerk to notify, inter alia, "any *lead* reporter or reporting supervisor." The commentator asserts that "lead reporter" is inconsistent with rule 9(e)(1), which refers to the "primary reporter." 2. Revised rule 30(c)(1) requires the clerk to send notification "promptly" when a notice of appeal is filed. The commentators propose qualifying "promptly" by adding the phrase, "but not later than [*a specified number*	1. Agree. The word has been changed to "primary reporter." 2. Disagree. The revised rules have consistently declined to add the qualification, "but not later than X days," unless the former rule so

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				of days]."	provided (e.g., former rule 39.54(d)(2)). Former rule 31(c) used the archaic word "forthwith," which the revised rules render as "promptly."
				3. Revised rule 30(c)(2) requires that the clerk's notification of the filing of the notice of appeal show "the date it was mailed, the number and title of the case, and the dates the notice of appeal and any certificate under (b)(2) were filed." The commentators propose adding, "the date it was prepared," in order to "identify any delay in the reporting process."	3. Disagree. Former rule 31 did not impose this additional burden on the clerk, and the commentators do not show that rule failed to work satisfactorily.
				4. Revised rule 30(c)(3) requires that the clerk's notification include "a copy of the sequential list of reporters made under rule 980.4." The commentators assert that "In Los Angeles County, the clerk's office *pretends* to comply with the requirement . . . by utilizing minute orders" (italics added), and propose that the rule should expressly prohibit that practice.	4. Disagree. It is not the function of statewide rules to address the asserted malpractice of a single county. Moreover, the complaint is really that the Los Angeles Clerk's Office is not complying with rule 980.4 itself, not with rule 30. The remedy, if one is needed, lies elsewhere.
24.	30	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	Under their contract with the judiciary, the five appellate projects have the duty of dealing with criminal appeals derailed by late filing, deficient notice of appeal, failure to file a certificate of probable cause, etc., but they can do so efficiently only if the Court of Appeal clerk notifies them promptly of such cases, and some do not. If the clerk did so, many such appeals could be saved by timely correct filings, obviating the need for the courts to deal with belated writ proceedings. To achieve this end, the commentators propose adding a new subdivision (d) to revised rule 30 directing the clerk in such cases to mark	Agree in part. A new subdivision is not necessary. The topic of late appeals should be addressed separately in the rule devoted to time to appeal (revised rule 30.1(c)). The topic of appeals deficient for want of a certificate of probable cause is now addressed in revised rule 30(b)(3), which imposes the clerk's duty proposed by the commentators.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				the notice of appeal "received [date] but not filed" or "inoperative [date]," notify the party, and send a copy of the marked notice of appeal to the appellate project for the district.	
25.	30.1	Maurice H. Oppenheim Attorney at Law	N	Former rule 31(a) began, "In cases provided by law," a notice of appeal must be filed within 60 days. Revised rule 30.1(a) begins, "Unless otherwise provided by law," the notice must be filed in 60 days. The commentator concludes that because the Advisory Committee Comment does not specifically list any exceptions to the 60-day rule "provided by law," there must be none—and that "someone must have the responsibility to update the commentary when necessary to include any later exceptions to the 60-day rule."	Disagree. The inference drawn by the commentator is unsupported: Advisory Committee Comments are not intended to serve as a substitute for legal research. The revised wording is more accurate than the former wording.
26.	30.1	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	To implement the change suggested in comment 24, the commentators propose deleting, in revised rule 30.1(c), the words "and notify the party that the notice [of appeal] was not filed because it was late," and substituting the words "Provide the notification required by rule 30(d)."	Disagree. The suggestion in comment 24 was not adopted as proposed. For the reasons stated in that comment, however, the words "and send a copy of the marked notice of appeal to the appellate project for the district" have been added to revised rule 30.1(c).
27.	30.2	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. In the rule title, change "bail on appeal" to "release pending appeal," because the defendant may ask for and obtain—rather than bail—release on his own recognizance or on conditions not requiring the payment of money. Quoting the Supreme Court, "We believe that the 'release pending appeal' terminology is generally preferable to the more common 'bail pending appeal' nomenclature, because the former term clearly indicates	1. Agree. The word "release" has been substituted for "bail" in both the title and the text of the rule. The rule has also been restructured to clarify its operation.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				that bail is only one condition, among others, that courts may utilize in the exercise of judicial discretion to assure a defendant's presence at all necessary proceedings." (*In re Pipinos* (1982) 33 Cal.3d 189, 192, fn.1, quoting *In re Podesto* (1976) 15 Cal.3d 921, 925, fn.1.) 2. In the Advisory Committee Comment, insert: "The remedy available under this rule is consistent with an appellant's separate remedy on habeas corpus. (See *In re Brumback* (1956) 46 Cal.2d 810, 815, fn. 3.)" Penal Code section 1490 has provided since 1872 that a prisoner "is entitled to a writ of habeas corpus for the purpose of giving bail . . ." Although there is now also a rule on the topic (existing rule 32(b)), the Penal Code section "has not been superseded" by the rule; rather, "The code section and the rule provide parallel and consistent remedies." (*Brumback*, supra, at p. 815, fn. 1.)	2. Agree. A statement to this effect has been added to the Advisory Committee Comment.
28.	30.2	Tressa S. Kentner Court Executive Officer San Bernardino Superior Court	N	The commentator makes the same point as comment 27.2.	Agree. See response to comment 27.2.
29.	30.3	Linda Robertson Supervising Attorney California Appellate Project	Y	Revised rule 30.3(a) allows a defendant to abandon his appeal by filing an abandonment signed by his attorney of record or by the defendant himself. The commentator is concerned that the rule does not protect defendants who, because of mental illness or retardation or other impairment, might sign an abandonment without being able to make an intelligent and informed decision to do so. The rule should provide that before dismissing an appeal on the basis of an abandonment signed only by the defendant, the court must give notice to the defendant's	Former rule 38 made no such provision, and the proposal would constitute a substantive change beyond the scope of this rules revision project.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				appellate counsel (or, if none, his trial counsel or "counsel specially appointed for the purpose") and give counsel the opportunity to inform the court whether counsel has any reason to believe the defendant may be incompetent to make the decision to abandon.	
30.	30.3	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	The commentators are concerned that an inexperienced attorney may not know the case law holding—according to the commentators—that "Abandonment of an appeal must be authorized by the client; an attorney lacks authority to do so unilaterally." The commentators propose adding to revised rule 30.3(a) the following: "Unless the People are the appellant, if signed only by the attorney the abandonment must include a declaration by the attorney that the client has authorized the abandonment."	Former rule 38 made no such provision, and the proposal would constitute a substantive change beyond the scope of this rules revision project.
31.	30.3	Maurice H. Oppenheim Attorney at Law	N	The commentator points out that paragraphs (1) and (2) of revised rule 30.3(c) require the clerk to "immediately notify" the reviewing court and the adverse party of the abandonment, while paragraph (1) further requires the clerk simply to "notify" the DA and the Attorney General and paragraph (3) requires the clerk to "promptly notify" the reporter if the latter has not yet filed the transcript. He suggests that all four should read, "immediately notify."	Agree in part. The phrase has been changed to "immediately notify" where it is used in all three paragraphs of revised rule 30.3(c), with the exception of its use in the second sentence of the first paragraph. That sentence simply *identifies* the particular parties the clerk must "immediately notify" under the first sentence when it is the defendant who abandons the appeal.
32.	30.3	Arnella Sims Los Angeles County Court Reporters Assn.	Y	1. Revised rule 30.3(c)(3) requires the clerk to "immediately" notify the reporter if the appeal is abandoned before the reporter has filed the transcript. The commentators propose qualifying "immediately" by	2. Disagree. The revised rules have consistently declined to add the qualification, "but not later than X days," unless the former rule so

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				adding the phrase, "but not later than [*a specified number of days*]."	provided (e.g., former rule 39.54(d)(2); former rule 38 did not even require the clerk to notify the reporter of an abandonment. The commentators do not explain the need for a departure from this practice.
				2. In revised rule 30.3(c)(3), add a requirement that the reporter be paid for any portion of the transcript completed before being notified of an abandonment, and a requirement that the reporter lodge or file such portion with the court "for purposes of auditing and so that that portion remains in the custody of the court for future use."	2. Former rule 38 contained no such provisions, and the proposals would constitute substantive changes beyond the scope of this rules revision project.
33.	31	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	Subdivision (b) of revised rule 31 lists 18 items required to be included in the clerk's transcript in a defendant's appeal, and subdivision (c) lists 11 items required to be included in the reporter's transcript in a defendant's appeal. Subdivision (a) also makes it mandatory to include all those items "if the People appeal from an order granting a new trial." The commentators suggest that in a People's new trial appeal, most of the items—specifically those listed in subdivisions (b)(1)–(11) and (c)(1)–(7)—may in fact not be necessary and should not be routinely included. The commentators reason that in a People's new trial appeal the issues are fewer than in a defendant's appeal from the judgment, and are usually known in advance. Therefore, unless the defendant cross-appeals, it would promote efficiency to structure the normal record requirement in a People's new trial appeal similarly to subdivision (d) of revised rule 31.	The proposal is beyond the scope of this rules revision project. The proposal has been referred to the Appellate Advisory Committee for further study.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				Subdivision (d) provides for a "limited normal record" in certain kinds of appeals, including a People's appeal from a judgment on a demurrer or from any appealable order *other than* a ruling on a new trial motion; in such an appeal, the normal clerk's transcript includes only 6 items and the normal reporter's transcript includes only "any oral proceedings incident to the judgment or order being appealed from," i.e., only the few proceedings actually *relevant to the appeal*. If in any case the People need additional items, the People could obtain them by request under revised rules 31.1 or 32.1. The commentators suggest that the district attorneys' offices be consulted for their response to this proposal.	
34.	31	Arnella Sims Los Angeles County Court Reporters Assn.	Y	1. The commentators assert that in preparing the transcript in a People's new trial appeal under revised rule 31(a), "The court reporter is not notified as to the grounds of appeal, which may involve sentencing or any number of other trial issues." 2. Revised rule 31(b)(14)(A) requires the clerk's transcript to include, in a defendant's appeal, "the reporter's transcript of any preliminary hearing examination of grand jury hearing." The commentators assert without further explanation that the "The proposed language violates Government Code section 69954(d) regarding photocopying and providing transcripts and	1. Disagree. To the extent the comment means that in preparing the transcript in a People's new trial appeal the reporter does not know which proceedings to include because he is not notified of the specific issues that the People intend to raise, the comment is inconsistent with the rule: under revised rule 31(a) (as under former rule 33(a)(2)), the duty of the reporter is to include *every* item listed in the rule. 2. Disagree. The revised rule tracks former rule 33(a)(1)(*l*), which likewise required the clerk's transcript to include, in a defendant's appeal, "copies of . . . the transcript of any preliminary examination or grand jury hearing related thereto." The comment raises

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				should be deleted."	issues beyond the scope of this rules revision project.
35.	31	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. Revised rule 31(b)(9) requires the clerk's transcript to include "any motion for new trial, with supporting and opposing memoranda and *affidavits*." The commentators propose changing the italicized word to "attachments," because a motion for new trial may be supported by other attached items, e.g., official records, other documents, photos, graphs, etc. 2. Revised rule 31(b)(1) requires the clerk's transcript to include "the notice of appeal *and any certificate of probable cause filed under rule 30(b).*" The commentators propose to replace the italicized words with, "and any request for a certificate of probable cause and the order ruling on it." They assert that appellate counsel may have a responsibility to pursue a denied request and needs to know its contents; and the Court of Appeal and the respondent will want to see the order granting or denying the certificate, because that information will affect the nature and scope of the appeal. Thus the request and the order are more relevant than the certificate itself. 3. Revised rule 31(b)(14)(D) requires the clerk's transcript to include, in a defendant's appeal, any record of a court or the Department of Corrections admitted in evidence to prove "a prior conviction or prison term." For completeness, the commentators propose to add, "or juvenile adjudication."	1. Agree. The word has been changed to "attachments." (See also revised rule 31(b)(14)(C).) 2. Disagree. Revised rule 31 deals with the contents of a normal record in an *appeal*. No authority is cited for the assertion that defendant's counsel on appeal may have a responsibility to pursue a denied request for a certificate of probable cause; and an order granting a certificate of probable cause is irrelevant to the scope of the appeal. 3. There are a number of different kinds of "juvenile adjudication," and certain of them could not be automatically included in the clerk's transcript without raising serious substantive problems. The proposal is beyond the scope of this rules revision project.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				4. Revised rule 31(c)(2) requires the reporter's transcript to include "the oral proceedings on any motion in limine." The commentators suggest moving the item into subdivision (c)(9), which specifies items to be included only if the appellant is the defendant. The commentators reason, "If the motion was resolved favorably to the defendant, it probably does not need to be in the record on a defendant's appeal." 5. In revised rule 31(c)(reporter's transcript), reverse the order of items (7) (proceedings at sentencing) and (8) (proceedings on new trial motion) in order to keep the list in chronological order. 6. Revised rule 31(c)(9)(A) requires the reporter's transcript in a defendant's appeal to include "the oral proceedings on any motion *under Penal Code section 1538.5* [motion to suppress evidence] denied in whole or in part." The commentators suggest deleting the italicized words and substituting "by the defendant." The commentators reason that the denial of *any* motion by the defendant after reported oral proceedings "will probably be important enough" to consider as a potential issue on appeal, and give as examples motions under *Miranda*, *Wheeler*, and *Pitchess*, and change of venue motions.	4. Disagree. If the motion was resolved favorably to the defendant, the People could need the motion in the record if they appeal from an order of new trial. Former rule 33(a)(2) included this item in the normal reporter's transcript, and no persuasive reason is given to change its location. 5. Agree. The change has been made. 6. The proposal is far-reaching and would constitute a substantive change beyond the scope of this rules revision project.
36.	31	Arnella Sims Los Angeles County Court Reporters Assn.	Y	1. Revised rule (c)(2) requires the reporter's transcript to include "the oral proceedings on any motion in limine." The commentators assert that in Los Angeles the clerk's minutes often note motion proceedings not by reciting the nature of the motions but simply by stating, "motions were heard as reflected in the court reporter's notes."	1. Disagree. The reporter is not responsible for making this determination: all motions made before trial are motions in limine, and all must therefore be included in the reporter's transcript under revised rule 31(c)(3).

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				Such motions often address such minor "housekeeping" matters as the defendant's request to make a phone call, to take a shower, to wear shoelaces, to receive visitors, etc. The commentators conclude, "The reporter should not be responsible to determine what is a motion in limine [i.e., for purposes of this rule] and what is not."	In so providing, the revised rule tracks former rule 31(a)(2).
				2. Revised rule 31(c)(3) requires the reporter's transcript to exclude the voir dire examination. But during that examination, the defendant may make and lose *Wheeler* motions, motions for mistrial, and other motions relevant to the appeal. The commentators assert that such motions are automatically transcribed today, and ask if they would be prohibited under the revised rule.	2. Any motions made and ruled on during voir dire are part of "the oral proceedings at trial" and therefore must be included in the normal reporter's transcript under revised rule 31(c)(3). In so providing, the revised rule tracks former rule 31(a)(2).
				3. Revised rule 31(c)(3) also requires the reporter's transcript to exclude the opening statements. Noting that judges often interrupt opening statements and read a few jury instructions to clarify the counsel's assertions, the commentators assert that under the revised rule these instructions would not be transcribed.	3. Disagree. Any such oral instructions must be included in the normal reporter's transcript under revised rule 31(c)(4). In so providing, the revised rule tracks former rule 31(a)(2).
				4. *Marsden* hearings are mentioned in revised rule 31.2(a), but are not listed among the items to be included in the normal reporter's transcript under rule 31(c). The commentators assert that in their experience if required proceedings are not "clearly delineated" a delay in record preparation results, requiring augmentation of the record.	4. Disagree. *Marsden* proceedings are not governed by revised rule 31, but by revised rule 31.2. Subdivision (a)(1) of that rule plainly contemplates that there will be a "reporter's transcript of any hearing held under *People v. Marsden*," and subdivision (a)(2) of the same rule directs the clerk to send that transcript to the reviewing court "with the record," i.e., as an addition to the normal record prepared under revised

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
					rule 31.
37.	31	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	In revised rule 31(d)(3), change "supporting *or* opposing memoranda and *affidavits*" to "supporting *and* opposing memoranda and *attachments*."	Agree. The change has been made.
38.	31	Eric Walden Supervising Writ Attorney Court of Appeal, 5th Dist.	N	1. As proposed, revised rule 31(b)(14)(A) requires the clerk's transcript in a defense appeal to include "the reporter's transcript of any preliminary examination or grand jury hearing." But former rule 33(a)(1)(*l*) required the clerk's transcript in such an appeal to include: "each written motion made by defendant and denied in whole or in part, with supporting and opposing memoranda and related affidavits, search warrants and returns, and the transcript of any preliminary examination or grand jury hearing *related thereto*." The commentator asserts that the qualifier "related thereto" referred to the word at the very beginning of the sentence, i.e., written *motions* by the defendant, and hence that the former provision meant the reporter's transcript must be prepared (and included in the clerk's transcript) only if it is " 'related' to a motion" by the defendant. He concludes that the revised rule unintentionally expands the provision to require the preliminary hearing transcript to be prepared in every case, which is wasteful: "If there wasn't a motion filed on it [*presumably meaning a motion to set aside the information under Pen. Code § 995*] in superior court, the transcript is irrelevant." He adds that it is even irrelevant if a Penal Code section 995 motion *was* filed, "because any error in denying that motion won't be prejudicial in the appeal," citing *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.	1. Agree in part. The commentator's reading of the former rule appears correct, and revised rule 31(b)(14) has been changed accordingly. The commentator's further assertion that the preliminary hearing transcript is always irrelevant to a criminal appeal is not persuasive: such a transcript may be helpful to the appellate court in various ways, e.g., in reviewing a claim that trial testimony was impeached by the same witness's testimony at the preliminary hearing.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				2. Revised rule 31(e) allows trial counsel to stipulate for the preparation of a partial transcript, i.e., to stipulate that "any part of the record is not required for proper determination of the appeal." The commentator asserts that the provision invites trial counsel to "create delays" if appellate counsel concludes that the omitted portions of the transcript should have been included and is compelled to seek augmentation.	2. Disagree. The provision is taken directly from former rule 35(f), and there is no showing that rule 35(f) caused any such delay problem.
39.	31	Arnella Sims Los Angeles County Court Reporters Assn.	Y	1. Revised rule 31(e) allows trial counsel to stipulate for the preparation of a partial transcript, i.e., to stipulate that "any part of the record is not required for proper determination of the appeal." The rule should also provide for notice to the reporter of any such stipulation, payment to the reporter for any work completed before such notice, and a requirement that the reporter lodge or file the partially completed transcript with the court for "purposes of auditing" or so that it remains in the court's custody "for future use." 2. The commentators urge the Judicial Council to adopt a change to rule 9 that would allow preparation of reporter's transcripts on a "one day/one volume" basis.	1. Former rule 35(f) contained no such provisions, and the proposals would constitute substantive changes beyond the scope of this rules revision project. 2. The proposal is beyond the scope of this rules revision project.
40.	31.1	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. Revise the title of the rule to avoid confusion with augmentations of the record by the reviewing court after the record is sent to that court (revised rule 32.1). 2. The commentators query whether "additional record" prepared under revised rule 31.1 is always to be included in and sent to the reviewing court with the normal record (revised rule 32), or may it be sent separately if the	1. Agree. The rule title has been revised accordingly. 2. The intent of revised rules 31.1 and 32 is that any "additional record" under rule 31.1 is to be included in and sent with the normal record under revised

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				normal record is sent before the additional record is ordered or prepared? If the former, this rule and revised rule 32(e) (Sending the transcripts) should make provisions for delaying the sending of the normal record until the additional record is ordered and prepared.	rule 32. The latter is unlikely to be ready to be sent *before* any such additional material is ready to be included. Rule 31.1(d)(1) imposes a strict time limit of five days for a trial judge to order any additional record, and subdivision (2) enforces that limit by providing that if the judge does not rule on the application within five days, the requested material (other than exhibits) must be included in the transcript "without a court order."
41.	31.1	Appellate Courts Com. State Bar of California	Y	Revised rule 31.1 should make it clear that an application to the superior court under that rule is not the only method of augmenting the normal record, but that rule 32.1 and rule 12 also authorize augmentations, albeit in the Court of Appeal. The commentators propose to do so in either of two ways. One, they suggest cross-referencing rules 12 and 32.1 early in the text of rule 31.1; or two, they suggest changing the title of rule 31.1 to "Pre-certification applications in superior court for additions to the normal record," and the title of rule 32.1 to "Augmenting or correcting the normal record after certification." The commentators reason that most criminal appeals are handled by court-appointed appellate counsel who do not see the record until it is filed; as a result, rule 31.1 effectively applies only to those few criminal cases in which trial counsel handles the appeal or appellate counsel is retained early enough to discover omissions in the record as it is prepared.	Agree in part. Whatever the practical reach of revised rule 31.1, it restates more clearly the terms of former rule 33(b). The suggestion to cross-reference rules 12 and 32.1 early in this rule is not compelling: subdivision (d)(1) of this rule provides that "Denial of the application [for additional record] does not preclude a motion in the reviewing court for augmentation under rule 12." It is true this provision appears near the end of the rule (as it did in former rule 33(b)); but the rule is short one, and the commentators do not suggest where in the rule it would fit better. The suggestion to revise the titles of both this rule and rule 32.1 to make their scope clearer has been adopted.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
42.	31.1	Tressa S. Kentner Court Executive Officer San Bernardino Superior Court	N	The commentator makes the same point as comment 41.	Agree in part. See response to comment 41.
43.	31.1	Arnella Sims Los Angeles County Court Reporters Assn.	Y	1. The commentators assert there is an inconsistency between revised rules 31 and 31.1, as follows: rule 31(c)(9)(B) requires inclusion in the reporter's transcript of the *closing* arguments in a defendant's appeal, but the People cannot request their inclusion in a People's appeal because rule 31.1(b)(3) allows the parties to request the additional inclusion only of *opening* statements. 2. Under subdivision (c)(3) of revised rule 31.1, the clerk must "immediately" (i.e., on filing) present any application for additional record to the trial judge "and, if appropriate, notify the reporter." The commentators stress that at that point, however, the court has not yet acted on the application; to require the clerk to notify the reporter before the court rules is "a useless act by the clerk, a confusing notification to the court reporter, and a needless requirement for additional paperwork." 3. The commentators point out that there is no provision for notifying the reporter either (1) when the court *grants* the application and orders additions to the reporter's transcript under subdivision (d)(1), or (2) when the court *fails* to rule within 5 days and hence the requested material "must be included [in the transcript] without a court order" under subdivision (d)(2).	1. Disagree. The People can do so under subdivision (a) of revised rule 31.1 (in a People's appeal, the People can request inclusion of "any item that would have been part of the normal record in a defendant's appeal"). 2. Agree. The requirement has been deleted from revised rule 31.1(c)(3). 3. Agree. New subdivision (d)(3) has been added directing the clerk to notify the reporter when additions to the transcript are required in either instance.
44.	31.2	Linda Robertson Supervising Attorney	Y	The commentator observes that revised rule 31.2(a)(4) allows the Attorney General to automatically obtain,	Disagree. Former rule 33.5(a) included the same provision, and the

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
		California Appellate Project		simply by filing a written request, a copy of a sealed *Marsden* transcript if the defendant raises a *Marsden* issue, unless the defendant files a notice that the transcript contains confidential material irrelevant to the appeal. The commentator urges that the rule be changed to require the Attorney General to file a *motion* for such transcript and thus allow the defendant to file an *opposition* giving reasons why the transcript should not be released, with a judge then exercising *discretion* to grant or deny the motion.	commentator does not show it was unworkable or unjust in its operation. The proposed change is beyond the scope of this rules revision project.
45.	31.2	Barry T. LaBarbera Presiding Judge San Luis Obispo Superior Court	N	The commentator "would like to see a more definitive process for court review (perhaps in camera by master or trial court) rather than defendant's notice of confidentiality."	The proposed change is beyond the scope of this rules revision project.
46.	31.2	Directors of the appellate projects for the First, Second, Fourth, and Sixth Districts	Y	As proposed, paragraph (2) of revised rule 31.2(a) directs the superior court clerk to send the original and two copies of a sealed *Marsden* transcript to the reviewing court with the record; paragraph (3) then directs the reviewing court clerk to send one of those copies "to the defendant's appellate counsel *when counsel is appointed* or, if counsel is retained, when counsel has appeared in the case." The italicized words imply that the clerk is to retain the transcript until appellate counsel is appointed. The commentators assert that in current practice, if appellate counsel has not been appointed (or retained) by the time the record and the *Marsden* transcripts arrive in the reviewing court—which is the most common case—the clerk instead sends the defense copy to the appellate project for the district. The commentators ask the rule to be changed to reflect this practice.	Agree. Revised rule 31.2(a)(3) has been revised to reflect the described practice.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
47.	31.2	Arnella Sims Los Angeles County Court Reporters Assn.	Y	Revised rule 31.2(a)(c) directs the superior court clerk to send the original and two copies of a sealed *Marsden* transcript to the reviewing court with the record. The commentators assert that the provision does not specify the number of copies that the reporter needs to prepare when there is more than one appealing defendant. (Compare revised rule 32(b)(3) ["If there is more than one appealing defendant, the clerk must prepare an extra copy [of the clerk's transcript] for each additional appealing defendant represented by separate counsel."]; id., subd (c)(2) [the reporter must do the same].)	Disagree. A *Marsden* transcript is defendant-specific: regardless of the number of appealing defendants, if only one defendant files a Marsden motion the reporter must prepare only the original and two copies of the transcript required by revised rule 31.2(a)(2). Former rule 33.5 did not provide otherwise.
48.	31.2	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. As further revised (see response to comment 46), paragraph (2) of revised rule 31.2(a) directs the superior court clerk to send the original and two copies of a sealed *Marsden* transcript to the reviewing court with the record, and paragraph (3) directs the reviewing court clerk to send one of those copies to the defendant's appellate counsel or, if counsel has not yet been retained or appointed, to the appellate project for the district. The commentators suggest it would be more efficient for the superior court clerk to send that copy of the transcript directly to appellate counsel or to the appellate project, rather than to the reviewing court clerk for the latter to send it on to counsel or the district. The latter act of sending is not discretionary. 2. In revised rule 31.2(a)(4), change "request" to "application," for consistency with the style of these rules.	1. Agree. Revised rule 31.2(a)(2)–(3) has been rewritten to so provide. 2. Agree. The word has been changed.
49.	31.2	Eric Walden Supervising Writ Attorney	N	1. Revised rule 31.2(a)(4) provides that the clerk "must" send to the Attorney General, on written request, a copy	1. Disagree. Former rule 33.5(a) included the same provision, and the

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
		Court of Appeal, 5th Dist.		of a sealed *Marsden* transcript if the defendant raises a *Marsden* issue, unless the defendant files a notice that the transcript contains confidential material irrelevant to the appeal. The commentator suggests that "If counsel is ineffective" in not making that request, the rule automatically gives the Attorney General access to confidential material that may be irrelevant to the appeal. The commentator proposes instead to give the reviewing court *discretion* to order that such transcripts be sent to the Attorney General or not. 2. Revised rule 31.2(b)(1)(A) authorizes a party to apply for an order that the record include a sealed reporter's transcript of any in-camera proceeding "at which a party was not allowed to be represented." The commentator asserts that the quoted wording is awkward, and "By its literal terms does not apply to a confidential hearing between a defendant's attorney and the judge if the defendant has waived being personally present." 3. Revised rule 31.2(b)(5) provides that sealed material may be examined "only by a reviewing court justice personally." The commentator asserts, "I don't think any of the Justices have the time to not delegate such a review to their researchers."	commentator does not show it was unworkable or unjust in its operation. The proposed change is beyond the scope of this rules revision project. 2. Disagree. The wording of former rule 33.5(b) (any in-camera proceeding "from which a party was excluded from being represented") was less clear. The commentator does not propose an alternate wording. 3. Disagree. Such delegation is permitted by the opening provision of this same paragraph, i.e., "Unless the reviewing court orders otherwise . . ." Outright deletion of the requirement of personal review would be a substantive change beyond the scope of this rules revision project.
50.	31.2	Arnella Sims Los Angeles County Court Reporters Assn.	Y	1. The commentators state generally that subdivision (b) of revised rule 31.2, which deals with in-camera proceedings other than *Marsden* hearings, is "unclear" because of its "non-specificity." The commentators	1. Disagree. The comment is unclear. If it means that revised rule 31.2(b) should specify these "other proceedings" by name, such a list would

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				assert that in view of the normal-record provisions of revised rule 31(c), other sealed proceedings such as *Pitchess* motions, informant motions, ex parte offers of proof, etc., would not automatically be prepared by the reporter, requiring additional augmentation transcripts. 2. The commentators assert that the reference in revised rule 31.2(b)(1)(A) to "a sealed, separately paginated reporter's transcript of any in camera proceeding" is unclear. They state that many pro tempore reporters have never worked in court before and many are untrained by the local court; it is therefore unreasonable to expect such reporters to know or remember that, as the rule requires, a sealed *Marsden* hearing must be separately paginated from other sealed proceedings. Moreover, the commentators warn that if there are a number of such proceedings in one case and the rule is obeyed, the reviewing court will have trouble determining the order in which they occurred because each transcript will start with page 1. The commentators propose, as a "more preferable, less confusing method," to produce all proceedings, sealed and unsealed, in a continuous sequentially numbered transcript. 3. Revised rule 31.2(b)(3) provides that the court "may order the reporter who attended the in-camera proceedings to personally prepare the transcript." The commentators assert that this provision does not contemplate a different reporter's doing the work when the attending reporter is not available because of death, illness, retirement, disability, etc.	be doomed to incompleteness. Former rule 33.5(b) did not attempt to list them, and the commentators do not show it was unworkable. 2. Disagree. The quoted wording of subdivision (b)(1)(A) is taken verbatim from former rule 33.5(b), and the commentators do not show it was unworkable. The further proposal for one continuous, sequentially numbered transcript would be a substantive change beyond the scope of this rules revision project. 3. Disagree. The provision is not mandatory: it says, the court *may*, not must, order the attending reporter to prepare the transcript. If that reporter is unavailable, presumably the court can assign a different one.
51.	31.2	Linda Robertson	Y	1. Under revised rule 31.2(b)(4), if the superior court	1. Agree. A new subdivision (b)(5) of

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
		Supervising Attorney California Appellate Project		grants an application to include sealed material in the record, the superior court clerk must send the resulting transcript to the reviewing court in an envelope marked "confidential," and the reviewing court clerk must file it separately. CAP points out that nothing in the rule requires either clerk to send a copy of the sealed transcript to the appellate counsel entitled to it, or even to notify all appellate counsel that such a transcript has been sent to the reviewing court. CAP explains that without such notice, appellate counsel may not know that sealed material has been transcribed, or even, in some instances, that such material exists at all. CAP suggests the addition of a requirement that the clerk notify appellate counsel when sealed records are sent to the reviewing court as part of the record on appeal. 2. As drafted, paragraph (5) of rule 31.2(b) provides: "Unless the reviewing court orders otherwise, material sealed under (4) may be examined only by a reviewing court justice personally, but parties and their attorneys who had access to the material in the trial court may also examine it." CAP asks that the sentence be broken in two, as follows: "Unless the reviewing court orders otherwise, material sealed under (4) may be examined only by a reviewing court justice personally. The reviewing court must also permit parties and their attorneys who had access to the material in the trial court to examine *and copy it*." (Italics added.) Citing a recent Attorney General Opinion (No. 02-103) assertedly stating that when language of a statute permits inspection of court documents, it does not imply permission also to copy them, CAP suggests it be made clear that under rule 31.2 the right to examine includes the right to copy.	revised rule 31.2 has been added to address the point. 2. Disagree. The proposed wording is clear and does not prohibit copying the material in question. The cited Attorney General opinion deals with a differently worded statute that reflects a particularly strong confidentiality policy of juvenile law.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
52.	31.3	Arnella Sims Los Angeles County Court Reporters Assn.	Y	Revised rule 31.3 (b)(1) requires the reporter to "redact" the reporter's transcript of the voir dire and the trial to substitute a juror's number for his or her name wherever that name appears. The commentators assert that the redaction process "is cumbersome and time consuming and would be unnecessary if bench officers were required, without exception, to address all jurors by the juror identifying numbers" rather than by their names.	Such a major change in the traditional way of conducting trials exceeds the scope of this rules revision project.
52.	31.3	Judge Peter L. Spinetta Contra Costa Superior Court	N	Revised rule 31.3 implements Code Civ. Proc. § 237. Subdivisions (b) and (c) of the rule include *alternates* with the trial jurors whose names are required to be redacted out of the transcript to protect privacy. The commentator asserts that the inclusion of alternates conflicts with language in the opinion in Bellas v. Superior Court (2000) 85 Cal.App.4th 636, 650, which describes the class of jurors protected by section 237 as "those who actually sat on the jury and participated in the verdict." The commentator also asserts the inclusion of alternates is inconsistent with "the ultimate purpose of CCP 237, which is to protect from harassment those actually rendering a verdict."	Disagree. Revised rule 31.3 restates without change existing rule 33.6, which was adopted contemporaneously with—and to implement—Code Civ. Proc. § 237. Section 237(a)(2) requires redaction of the personal-identifying information of "trial jurors, as defined in Section 194." In turn, section 194(o) defines "trial jurors" as "those jurors *sworn* to try and determine by verdict a question of fact" (italics added)—it does not refer to those jurors who actually went on to "participate in the verdict." Alternates are also sworn to try the case: Code Civ. Proc. § 234 declares that when alternate jurors are deemed necessary to a trial they must "take the same oath as the jurors already selected." *Bellas* is distinguishable: the case does not address the question whether Code Civ. Proc. § 237 is intended to protect the privacy of alternate jurors—the phrase "alternate

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
					jurors" appears nowhere in the opinion. Rather, *Bellas* addresses the wholly different question whether the trial judge can compel the defense attorney to return to the court the defense copies of the juror questionnaires after the trial is over.
53.	32	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. The focus of revised rule 32(a) is not a general "time to prepare" the record but a special requirement that the reporter and the clerk immediately begin preparation when an appeal is likely. The subdivision title should reflect this focus. 2. For clarity and better grammar, the commentators suggest breaking up paragraph (2) of revised rule 32(a) into two sentences after the phrase "facts of the case."	1. Agree. The title has been revised accordingly. 2. Agree in part. The sentence has not been broken up but clarifying words have been inserted.
54.	32	Arnella Sims Los Angeles County Court Reporters Assn.	Y	As proposed, revised rule 32(a) is inconsistent with the statute it implements, Code Civ. Proc. § 269, subd. (b). The statute provides that in any case in which the defendant is convicted of a felony after a trial, "the record on appeal *shall be prepared* immediately after the verdict or finding of guilt is announced *unless the court determines* that it is likely that no appeal from the decision will be made." The statutory wording thus does not contemplate a court *order to prepare* the record in such cases; rather, the preparation of the record is automatic. Only if the court determines that an appeal is unlikely will an order be required, i.e., to *prevent* preparation of the record. This construction of the statute promotes its intent to speed up preparation of the record in criminal appeals, because it bypasses the delay that	Agree. Subdivision (a)(1) of revised rule 32 has been rewritten to conform to the statute.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				might result from requiring a court order in every case. The rule should conform to the statute.	
55.	32	Terry Weiss Manager, Court Reporter Services Los Angeles Superior Court	Y	The commentator makes the same point as comment 54.	Agree. See response to comment 54.
56.	32	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. In revised rule 32(b) [now subd. (c)], insert a provision directing the clerk when to *begin* preparing the clerk's transcript, i.e., "on being notified under rule 30(c)(1)."	1. Agree in part. New paragraph (1) has been added to revised rule 32(c), directing the clerk to begin preparing the transcript immediately "after the notice of appeal is filed." Cross-reference to rule 30(c)(1) is unnecessary because new subdivision (b) of revised rule 32 (former rule 31(d)) specifies the time to begin preparing the record in certificate appeals.
				2. Renumbered subdivision (c)(2) of revised rule 32 should be revised to read: "Within 20 days after ~~the notice of appeal is filed~~ notification under rule 30(c)(1) is given or within any time ordered under (e), the clerk must complete preparation of an original and two copies of the clerk's transcript."	2. Disagree. A cross-reference to rule 30(c)(1) is unnecessary because new subdivision (b) of revised rule 32 (former rule 31(d)) specifies the time to begin preparing the record in certificate appeals. And a cross-reference to the general time-extension provision of subdivision (e) would be inconsistent with the style of these revised rules.
				3. From renumbered subdivision (d)(1) of revised rule 32, delete the italicized words: "immediately on being notified by the clerk under rule 30(c)(1) *that the notice of appeal has been filed*."	3. Disagree. The italicized words add clarity to the provision.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				4. Amend revised rule 32(d)(3) as follows: "The reporter must deliver the original and all copies to the superior court clerk as soon as they are certified, but no later than 20 days ~~after the notice of appeal is filed~~ after notification under rule 30(c)(1), or within any time ordered under (e)." 5. For grammar, amend subd (d)(4) as follows: "Any additional copies needed must not be retyped but must be prepared by photocopying or equivalent process."	4. Disagree. See response to comment 56.2. 5. Agree. The proposed words have been inserted.
57.	32	Tressa S. Kentner Court Executive Officer San Bernardino Superior Court	N	To facilitate prompt preparation of reporter's transcripts of criminal trials, require that a reporter must "personally participate" in any request to extend time to prepare the reporter's transcript. Proposes to do so by amending rule 32(e)(2)(A) as follows: "an affidavit showing good cause, which, in the case of a reporter's transcript, absent extraordinary circumstances, shall be the affidavit of each of the responsible reporters whose transcript is delayed;"	The proposed change is beyond the scope of this rules revision project.
58.	32	Arnella Sims Los Angeles County Court Reporters Assn.	Y	In revised rule 32(d)(5), change "lead reporter" to "primary reporter."	Agree. The word has been changed.
59.	32	Terri White Court Program Supervisor Ventura Superior Court	N	Revised rule 32(d)(3) requires the reporter to prepare the reporter's transcript no later than 20 days after the notice of appeal is filed. The commentator suggests the rule be changed to 20 days after being notified under rule 30(c)(1) that the notice of appeal has been filed.	Disagree. In this provision the revised rule tracks former rule 35(b), which was designed to expedite the preparation of the reporter's transcript in criminal appeals. The proposed change is beyond the scope of this rules revision project.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
60.	32	Appellate Courts Com. State Bar of California	Y	To facilitate prompt preparation of reporter's transcripts of criminal trials, require that a reporter must "personally participate" in any request to extend time to prepare the reporter's transcript. Proposes to do so by amending rule 32(e)(2)(A) as follows: "an affidavit showing good cause, which, in the case of a reporter's transcript, absent extraordinary circumstances, shall be the affidavit of each of the responsible reporters whose transcript is delayed;"	Disagree. See response to comment 57.
61.	32	Directors of the appellate projects for the First, Second, Fourth, and Sixth Districts	Y	As proposed, par. (1) of revised rule 32(f) directs the superior court clerk, when the transcripts are certified as correct, to send the original to the reviewing court and a copy to defendant's appellate counsel (and the Attorney General); and par. (2) provides, "If the clerk does not know the identity of the defendant's appellate counsel, the clerk must send that counsel's copy of the transcripts to the reviewing court for forwarding to such counsel." The commentators propose that to be consistent with current practice, par. (2) should instead direct the clerk to send appellate counsel's copy in that circumstance to the appellate project for the district, which will forward it to such counsel in due course.	Agree. The provision has been rewritten accordingly.
62.	32	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. Amend revised rule 32(f)(1) as follows: "When the clerk's and reporter's transcripts are certified as correct, the clerk must promptly send the original to the reviewing court, noting the sending dates on the original; ~~and~~ one copy of each to each defendant's appellate counsel and to the Attorney General; and a copy to the district attorney if one has been requested under (c)(2)	1. Agree. The provision has been reworded and restructured for clarity.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				~~noting the sending dates on the original and notifying the district attorney that the prosecution's copy has been sent to the Attorney General~~." The commentators assert this rewording is consistent with practical policies noted in the Advisory Committee Comment. 2. As proposed, par. (1) of revised rule 32(f) directs the superior court clerk, when the transcripts are certified as correct, to send the original to the reviewing court and a copy to defendant's appellate counsel (and the Attorney General); and par. (2) provides, "If the clerk does not know the identity of the defendant's appellate counsel, the clerk must send that counsel's copy of the transcripts to the reviewing court for forwarding to such counsel." The commentators propose that to be consistent with current practice, par. (2) should instead direct the clerk to send appellate counsel's copy in that circumstance to the appellate project for the district, which will forward it to such counsel in due course.	2. Agree. The provision has been rewritten accordingly.
63.	32	Linda Harris Cal. Official Court Reporters Assn.	Y	In revised rule 32(h), "insure" should be spelled "ensure."	Agree. The spelling has been changed.
64.	32	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	In the Advisory Committee Comment to revised rule 323 32(c), the word "rule-preparation" should be "record-preparation."	Agree. The word has been changed.
65.	32.1	Tressa S. Kentner Court Executive Officer San Bernardino Superior	N	The commentator makes essentially the same point as comment 41.	Agree in part. See response to comment 41.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
		Court			
66.	32.1	Appellate Courts Com. State Bar of California	Y	The commentators make essentially the same point as comment 41.	Agree in part. See response to comment 41.
67.	32.1	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. The commentators make essentially the same point as comment 41. 2. Amend revised rule 32.1(b) as follows: "**Omissions.** If, after the record is certified, the superior court clerk or the reporter learns that the record omits a document or transcript that any rule requires to be included or that the superior court has ordered under rule 31.1, the clerk must promptly copy and certify the document or the reporter must promptly prepare and certify the transcript" and send it without a further court order to the reviewing court and counsel.	1. Agree in part. See response to comment 41. 2. Agree in part. The words "or order" have been inserted into the provision to make it clear that it also applies a document or transcript ordered to be included under *any* rule of court.
68.	32.1	Arnella Sims Los Angeles County Court Reporters Assn.	Y	The commentators recognize that revised rule 32.1(b) [quoted in the preceding comment] restates the language of existing rule 35(e), but asserts that "the court reporters in Los Angeles are unable to comply because the clerk's office will not accept any portion that was not included as a date on the appeal notice. If any omissions are made, they are dealt with by means of a formal augmentation ordered by the reviewing court." The commentators conclude, "Because this rule can be interpreted in more than one way, perhaps it should be redrafted so its intent is clearer." No redraft is offered.	Disagree. The intent of the provision is clear. The commentators do not assert that any other county clerk's office misconstrue this provision. It is not the function of statewide rules to resolve local disputes.
69.	32.1	Directors of the appellate projects for the First,	Y	The commentators make essentially the same point as comment 61.	Agree. The provision has been rewritten accordingly.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
		Second, Fourth, and Sixth Districts			
70.	32.1	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. The commentators make essentially the same point as comment 61. 2. In the Advisory Committee Comment to revised rule 32(a), the reference to "former rule 33(e)" should be to "former rule 35(e)."	1. Agree. The provision has been rewritten accordingly. 2. Agree. The reference has been corrected.
71.	32.2	Maurice H. Oppenheim Attorney at Law	N	Revised rule 32.2 provides that an agreed statement in a criminal case must comply with "the relevant provisions" of rule 6 (agreed statement in civil cases). The commentator asserts that although "the change is an improvement" (the former rule provided, "conform as far as possible"), the Advisory Committee Comment should spell out which provisions of rule 6 are in fact relevant in criminal cases.	Disagree. There are many similar cross-references in the former and revised rules, and none spell out the matter; to do so would defeat the purpose of such a cross-reference, which is to call attention to related provisions without repeating them in extenso.
72.	32.3	Gloria Barnes Legal Process Clerk Santa Cruz Superior Court	N	The revised rule provides that when "a party" learns a portion of the oral proceedings cannot be transcribed, "the party" may proceed by settled statement. The commentator inquires whether it should specify, "a party to the action"?	Disagree. The term is clear from the context.
73.	32.3	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	1. Former rule 36(b) required that an application for permission to prepare a settled statement "shall be verified and shall contain a statement of the facts or a certificate of the clerk showing that a reporter's transcript cannot be obtained." Revised rule 32.3(a) deletes the verification requirement as an unnecessary formalism. The commentators propose to restore the verification	1. Disagree. *Gzikowski* says nothing about the former verification and certification requirements, and *Marks* mentions them only in cataloguing the then-existing requirements of former rules 7 and 36(b) to make the point that *Marks* none of those requirements were

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				requirement and to provide further that "The application must include a clerk's certification or other explanation why oral proceedings cannot be transcribed." The commentators cite *Marks v. Superior Court* (2002) 27 Cal.4th 176, 193-197, and *People v. Gzikowski* (1982) 32 Cal.3d 580, 584, fn.2. 2. Include in the Advisory Committee Comment a reference to Penal Code section 1181, subdivision 9, which provides an alternative remedy when an reporter's transcript is unavailable "because of the death or disability" of the reporter or "because of the loss or destruction, in whole or in substantial part, of the notes" of the reporter. In either event the statute allows the defendant to apply to the trial judge or the reviewing court to set aside the judgment and order a new trial. The commentators assert that such a cross-reference would alert inexperienced practitioners to this remedy as an alternate to a settled statement in certain situations.	observed. In revising rule 32.3 it was decided to delete these particular requirements on the ground they were an unnecessary formalism and to substitute the simpler requirement that "The application must explain why the oral proceedings cannot be transcribed." The sufficiency of that explanation is for the court to decide. 2. The proposed change is beyond the scope of this rules revision project.
74.	32.3	Maurice H. Oppenheim Attorney at Law	N	The commentator points out that revised rule 32.3 3 "does not indicate how the settled statement gets to the appellate court." He also points out that although revised rule 31(b)(13), as proposed, makes "any order for a settled statement" part of the *clerk's* transcript on appeal, there is no provision making the statement itself part of the *reporter's* transcript. He notes that in civil cases revised rule 4(g)(2) provides that when an agreed or settled statement is used because some or all of the proceedings cannot be transcribed, "If the agreed or	Disagree. The practice in criminal cases is not to make a settled statement a part of the reporter's transcript itself but to include it as a separate item in the record sent to the reviewing court. In recognition of this practice, the provision of revised rule 31(b)(13), as proposed, making any order for a settled statement part of the clerk's transcript has been deleted; the revised rule thus

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				settled statement contains all the oral proceedings, it will substitute for the reporter's transcript; if it contains a portion of the proceedings, it will be incorporated into that transcript." The commentator suggests providing the same in criminal cases.	tracks former rule 33(a)(1), which included no such provision.
75.	33	Directors of the appellate projects for the First, Second, Fourth, and Sixth Districts	Y	1. Revised rule 33(b)(1) provides that a brief produced on a computer must not exceed 21,000 words. This figure is intended to translate into word count the figure of 75 pages stated in former rule 37(a), using a ratio of 280 words per page. 280 words per page is the ratio used to make this translation in all the rules revised thus far, beginning with rule 14(c); it is the average number of words on an 8-1/2 x 11 page, *double-spaced*. But rule 14(b)(5) also permits the text of briefs to be *one-and-a-half-spaced* ("The lines of text must be unnumbered and at least one-and-a-half-spaced."). The average word count of a page that is one-and-a-half spaced is approximately 340 words, or some 21 percent more than that allowed by the revised rule. The revised rule thus penalizes defendants whose counsel use one-and-a half spacing in their briefs. It should be changed to reflect a word count consistent with 75 pages of one-and-a-half-spaced text. 2. Revised rule 33(c)(5) provides that if a party fails to timely file a brief in a criminal case, the provisions of rule 17 on such failure in a civil case apply, except that the clerk must give the defaulting party 30 days' notice (instead of 15 days) to cure the failure. The notice must state that if the late brief is the appellant's opening brief, *the court will dismiss the appeal*, and the reviewing court may so order (id., subds (a)(1) and (c)). The	1. 2. Disagree. The first alternative runs afoul of a major purpose of this rules revision project, which is to separate the civil and criminal rules and avoid expressly referring to the latter in the text of the former insofar as possible. The second alternative unduly lengthens and complicates revised rule 33.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				commentators assert that if defendant's counsel was appointed, as is usually true, the current practice of reviewing courts in such cases is not to dismiss the appeal but to appoint new counsel; indeed, this is required by the fact that the court has a constitutional duty to provide defendants with *effective* counsel. The commentators ask that the rule be changed to reflect this reality. They propose two alternative ways to do so. First, amend rule 17 itself to add a new sanction rule 17(a), i.e., "(3) If counsel is appointed, the court may relieve counsel and appoint new counsel." Second, instead of cross-referencing rule 17 in rule 33(c), spell out the provisions of rule 17(a) and (c) in rule 33(c), adding the above new provision for court-appointed counsel.	Former rule 37(b) did not expressly recognize a practice of appointing new counsel as a sanction for failure to file a timely brief, and the commentators do not assert that the rule prevented the reviewing courts from taking that step when appropriate. The proposed change is beyond the scope of this rules revision project.
76.	33	Kimberly Stewart Appellate Court Com. San Diego County Bar Assn.	Y	The commentators make essentially the same points as comments 75.1 and 75.2.	Disagree. See responses to comments 75.1 and 75.2.
77.	33	Directors of the appellate projects for the First, Second, Fourth, and Sixth Districts	Y	1. Former rule 37(a) stated in the passive voice that "Every brief of the defendant shall be served" on the district attorney and the Attorney General. The commentators assert that by putting the quoted sentence into the active voice revised rule 33(d)(1) unwittingly makes a substantive change by requiring that *counsel personally sign* the proof of service, whereas in practice the proof of service is often signed by counsel's secretary or other support person who actually mails the briefs. They ask for restoration of the passive voice to avoid this implied requirement.	1. Agree. The provision has been rewritten accordingly.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				2. As proposed, revised rule 33(d)(1) further provides that defense counsel must send a copy of the brief to the defendant unless the defendant requests otherwise in writing, and "Counsel's signed statement *that a copy was sent to the defendant or* that counsel has the defendant's written request that copies not be sent to the defendant is sufficient to show compliance with this subdivision, . . ." The commentators suggest deleting the italicized phrase, reasoning that the notation on the proof of service that a copy was sent to the defendant should be sufficient in cases in which counsel *does* send a copy to the defendant. 3. The commentators state that when a defendant is represented by appointed counsel, it is the practice of the People to serve one copy of the People's brief on the appellate project for the district. This is important because it allows the projects to fulfill their duties to the reviewing court in timely fashion. The commentators ask that the rule reflect this practice.	2. Agree. The matter has been dealt with in new subdivision (d)(2) of revised rule 33. 3. Agree. A provision to this effect has been added to revised rule 33(d)(3).
78.	33	Steve Cooley District Attorney of Los Angeles County	Y	Revised rule 33(e) provides that "*When both a defendant and the People appeal, the defendant must file the first opening brief* unless the reviewing court orders otherwise, and rule 16(b) governs the contents of the briefs." Focusing on the italicized words, the commentator asserts they cause an unnecessary delay when it is the district attorney who represents the People in the People's appeal: the commentator explains that in such a combined appeal 79.the Attorney General represents the People in the *defendant's* appeal, and there is little reason for the district attorney to await the filing of the defendant's brief before filing the opening brief in the *People's* appeal.	Disagree. The circumstance posited by the commentator is not common, and when it arises it can be and is addressed on an ad hoc basis. The proposed change is beyond the scope of this rules revision project.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
79.	33.3	Maurice H. Oppenheim Attorney at Law	N	The Advisory Committee Comment to revised rule 33.3(a) should not assert that this rule clarifies the applicability, to noncapital criminal appeals, of the "relevant" rules governing the hearing and decision of civil appeals in the Supreme Court (rules 28-29.9), because all those rules are relevant to criminal appeals.	Agree. The word "relevant" has been deleted.
80.	Gen'l	Sergeant J. Leberman San Joaquin Sheriff's Dept.	N	Agrees with proposed rules 34–36.3.	No response necessary.
81.	Gen'l	Michael D. Planet Executive Officer Ventura Superior Court	N	Agrees with proposed rules 34–36.3 and states that the separation of the capital rules from the noncapital criminal rules will make it easier to identify an applicable rule during record preparation.	No response necessary.
82.	34	Michael G. Millman Director California Appellate Project	Y	Revised rule 34(c) requires trial courts to consider the "relevant policies and factors stated in rule 45.5" when acting on requests to extend time. The commentator asserts that this wording improperly conveys the message that extensions are "disfavored" because rule 45.5(a) says that rule-specified times "should generally be met," and it is highly unrealistic in capital cases for rule 45.5(c)(3) to say that one volume of clerk's transcript and two of reporter's transcript is considered an "average-length record." The commentator suggests that an equivalent of rule 45.5 be drafted specifically for capital cases.	Disagree. Nothing in rules 34 or 45.5 fairly conveys the message that extensions are "disfavored." (See especially rule 45.5(a), 2d par.) Courts are to consider the policies and factors of rule 45.5 only to the extent they are "relevant" and counsel are free to argue that particular policies or factors are not relevant to capital cases. To clarify the point, the Advisory Committee Comment to revised rule 34(c) emphasizes one factor particularly relevant to capital appeals and explains that rule 45.5's definition of an "average-length record" applies instead to civil and noncapital criminal cases.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
83.	34	Maurice H. Oppenheim Attorney at Law	N	1. The Advisory Committee Comment to rule 34(c) states: " 'The average-length record' described in the second sentence of subdivision (c)(3) . . . refers to records in civil and noncapital criminal cases; . . ." The commentator suggests moving this statement to the Advisory Committee Comment on rule 45.5. 2. Revised rule 34(c) requires trial courts to consider the "relevant policies and factors stated in rule 45.5" when ruling on extension requests. The commentator objects that this language is "a new style to indicate a cross reference" that "opens up a Pandora's Box." He suggests that the rule refer instead to "the relevant provisions of rule 45.5." 3. In the Advisory Committee Comment to revised rule 34(c), the commentator suggests changing the phrase "makes mandatory for" to the single word "requires."	1. Disagree. Although the quoted comment would also be appropriate for rule 45.5, it is relevant to rule 34 for the reasons stated in the preceding comment and response. Rule 45.5 is not being revised at the present time. 2. Disagree. Subdivision (a) of rule 45.5 is entitled "Policy on time extensions" and its subdivision (c) is entitled "Factors considered." Thus there should be no uncertainty as to which parts of rule 45.5 are cross-referenced in revised rule 34(c). Although the style is new in the revised rules, it tracks former rule 39.50(d) ("the court may consider the policies and factors contained in rule 45.5, to the extent they are applicable"). 3. Agree. Although the original wording was a symmetrical construction used for the purpose of contrast, the proposed substitute is simpler.
84.	34.1	Michael Laurence Director Habeas Corpus Resource Center	Y	The cross-references to certain criminal rules in revised rule 34.1 should be replaced with the full text of the cited rules.	Disagree. Former rule 39.50(a) provided that the criminal rules applied "except where otherwise provided by these rules." The revised capital rules are largely self-contained, but include a limited number of specific cross-

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
					references to the criminal rules to avoid undue repetition. To repeat the full text of those rules in the capital rules would defeat that purpose for no real benefit. Revised rule 34.1 will be administered primarily by superior court clerks.
85.	34.1	Kent Barkhurst Sr. Dep. State Public Defender Office of the State Public Defender	Y	The commentator asserts that trial exhibits "have long been considered part of the record on appeal" and urges that revised rule 34.1 be amended to so state, as did its predecessor former rule 33(a)–(b).	Agree. The point is now addressed in revised rule 34.1(a)(3).
86.	34.1	Eileen M. Stutson Legal Processing Supervisor San Bernardino Superior Court	N	Revised rule 34.1(a)(1)(D) requires the master index of the *clerk's* transcript to include, inter alia, an index of "all sealed *reporter's* transcripts with the date and the name of the parties present." The commentator urges that such an index should instead be prepared by the reporter and be included in the master index of the reporter's transcript, because the reporter has the necessary information and rule-time constraints would make it difficult for the clerk to obtain that information in timely fashion.	Agree. Revised rule 34.1 has been rewritten to so provide. (See revised rule 34.1(d).)
87.	34.1	Hannah Inouye Manager, Appeals Division Los Angeles Superior Court	N	The commentator makes essentially the same point as the preceding comment.	Agree, for the reasons given in the preceding response.
88.	34.1	Michael Laurence Director Habeas Corpus Resource Center	Y	Revised rule 34.1(b) should be clarified in light of Penal Code § 987.9, subd. (d), and *People v. Superior Court (Berryman)* (2000) 83 Cal.App.4th 308, by the addition of a new paragraph (4) reading: "Any application by the	Disagree. The proposed addition goes well beyond the holding of *Berryman* and broadly expands, rather than "clarifies," the rule. It is therefore

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				Attorney General to the superior court pursuant to California Penal Code Section 987.9 subsection (d) must set forth a prima facie showing that the requested documents described in revised rule 34.1(a)(1)(D) relate to an issue the defendant raised on appeal or collateral review. Thereafter, the superior court, after *in camera* review of the documents and having afforded defense counsel an opportunity to assert any applicable privilege or other rule of law barring disclosure, shall determine which portions of the documents, if any, are relevant to the issues raised by the defendant."	beyond the scope of this rules revision project.
89.	34.1	Dennis Peter Maio Director Capital Central Staff Supreme Court	N	1. Revised rule 34.1(d) should refer to "the tables of contents for the clerk's transcript" rather than "the indexes for the clerk's transcript." 2. Revised rule 34.1(b)(1) should refer to documents lodged confidentially as well as documents filed confidentially.	1. Disagree. Although the documents referred to are, strictly speaking, tables of contents, they are commonly called indexes in this context. (See, e.g., rule 9(b).) 2. Agree. The references have been added.
90.	34.2	Maurice H. Oppenheim Attorney at Law	N	Revised rule 34.2 is out of place in the appellate rules because it addresses events occurring before the trial and imposes duties on trial counsel rather than appellate counsel. Because trial counsel will be unlikely to consult these rules, the committee should suggest adding a cross-reference to rule 34.2 in the Penal Code provisions governing pretrial proceedings.	Disagree. Although it mandates procedures for trial counsel to undertake before or during trial, rule 34.2 has practical significance only for a subsequent appeal and thus belongs in the rules governing capital appeals. The suggestion for adding a cross-reference in the Penal Code is beyond the scope of this rules revision project.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
91.	34.2	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	The rule should explain that it applies only to appeals from judgments imposed after trials that began on or after Jan. 1, 1997, either in its title or by adding an "application" subdivision.	Disagree. By the time the rule takes effect, there will be few if any pre-1997 cases still in the record-certification stage, and any counsel handling a pre-1997 case will understand it is governed by revised rule 35.3, as stated in the Advisory Committee Comment to rule 34.2 and the title and subdivision (a) of rule 35.3.
92.	34.2	Judy Pieper Criminal Courts Coordinator Los Angeles Superior Court	N	Revised rule 34.2(c)(2) requires the judge who presided at any preliminary examination—in the court of limited jurisdiction—to supervise the preparation of the record of the "pretrial proceedings." The commentator objects to this requirement because under subdivision (a)(1) "pretrial proceedings" includes all proceedings held before trial, including therefore proceedings held in the court of general jurisdiction *after* the information is filed.	Agree, but the problem has been resolved by replacing "pretrial proceedings" in revised rule 34.2 by the phrase "preliminary proceedings," now defined in subdivision (a)(1) as "all proceedings held *prior to and including* the filing of the information or indictment . . . ."
93.	34.2	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	Revised rule 34.2 refers to "the presiding superior court judge." Delete as superfluous "superior court."`	Disagree. The qualifier is required for clarity.
94.	34.2	Judge Roger D. Randall Kern Superior Court	N	Revised rule 34.2(b) imposes certain duties on "the clerk" when the prosecution is seeking the death penalty. The rule should include a definition of "clerk" to indicate whether the duty is imposed on the judge's clerk, the appeals clerk, or the chief clerk.	Disagree. Former rule 39.52 likewise left the question to the discretion of the individual superior courts, which may have different preferences about which clerk should perform these duties.
95.	34.2	Thomas E. Pringle President Cal. Court Reporters Assn.	Y	Revised rule 34.2(b)(1) requires the clerk, after the prosecution gives notice it intends to seek the death penalty, to "promptly enter the information in the	Disagree. Entry of the information in the record does not trigger notice to the reporter to prepare the transcript. That

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				record." The reporters' association urges that "promptly" be followed by a specific time limit such as 5 days, so that the reporter is assured of receiving notice to prepare the transcript within a reasonable period.	notice is governed by revised rule 34.2(d), which requires the clerk to notify the reporter within 5 days after receiving notice that the prosecution is seeking the death penalty or after notifying the judge that the prosecution is presumed to seek the death penalty.
96.	34.2	Judge Roger D. Randall Kern Superior Court	Y	Revised rule 34.2(b)(2) provides that if the prosecution fails to give notice that it does or does not intend to seek the death penalty within 60 days before the date set for trial, the clerk must notify the responsible judge that the prosecution is presumed to seek the death penalty and so note in the record. The commentator suggests that a better system would be for the responsible judge to contact the prosecutor to inquire whether he or she intends to seek the death penalty.	Disagree. The proposal would impose an additional duty on all trial judges involved in capital cases. The burden should remain on the prosecution to make clear its intent. The revised rule tracks former rule 39.52(b) in this regard.
97.	34.2	Jody L. Isenberg President Cal. Judicial Attorneys Assn.	Y	In cases in which the prosecution failed to give timely notice that it did or did not intend to seek the death penalty, former rule 39.52(b)(2) declared, "for the purposes of this rule only," a presumption of intent to seek that penalty. Revised rule 34.2(b)(2) preserves the presumption but not the quoted qualification. The commentator asserts the rule is now ambiguous because it can be read to imply that the presumption of intent to seek the death penalty "applies for all purposes, including for example, jury selection."	Disagree. Fairly read, the revised rule is not ambiguous. The deleted qualification was therefore superfluous.
98.	34.2	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	Revised rule 34.2(e)(1) requires the reporter to prepare 5 copies of the reporter's transcript of the preliminary proceedings. The commentators state this imposes an	Disagree. The clerk needs one copy for each trial counsel (revised rule 34.2(f)), one copy for defendant's appellate

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				unnecessary cost because the clerk needs a maximum of 3 copies of this transcript—one for each trial counsel and one for defendant's pretrial counsel if different from trial counsel.	counsel and one copy for defendant's habeas corpus counsel (revised rule 35.1(g)(1) ["one paper copy of the *entire* record"]), and one copy for the Governor (revised rule 35.2(e)(3)). These rules track the former rules.
99.	34.2	Maurice H. Oppenheim Attorney at Law	N	Revised rule 34.2(f)(2)(A) requires defendant's trial counsel to "review the reporter's transcript [of the preliminary proceedings] for errors or omissions." The commentator asserts that if the case is prosecuted by indictment, this is an impossibility because defense counsel is not present at the grand jury hearing.	Disagree. Defense counsel remains able to review the transcript for any patent errors (e.g., mistakes in spelling of names or obvious errors in dates) or omissions (e.g., testimony referred to but not included in the transcript).
100.	34.2	Kent Barkhurst Sr. Dep. State Public Defender Office of the State Public Defender	Y	Revised rule 34.2(g)(3) provides that a counsel's request for additions to the reporter's transcript "*must* state the nature and date of the proceedings and identify the reporter who transcribed them." The commentator asserts that it may be difficult or impossible for habeas corpus counsel to identify the reporter years after the trial, and asks that it be mandatory only when the information is known to counsel.	Agree. The revised rule has been changed to require a statement of the reporter's identity only "if known."
101.	34.2	Maurice H. Oppenheim Attorney at Law	N	Revised rule 34.2(g)(4) requires the designated judge to "fix" a date for compliance. Because "fix" assertedly has "a sinister meaning" of corruption, it should not be used in the rules. "Set" would be a suitable alternative.	Disagree. As used in these rules, the phrase to "fix" a date for action has no such connotation. (See, e.g., rules 4(g)(1)(B), 7(c)(2).)
102.	34.2	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	1. Revised rule 34.2(h)(2) authorizes the judge to order preparation of a settled statement under revised rule 32.3 of any portion of the proceedings that cannot be transcribed. The commentators reiterate an objection	1. Disagree. The objection is unpersuasive for the reasons stated in the response to comment 73.1.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				they made to rule 32.3, i.e., that it deletes as an unnecessary formalism the requirement of former rule 36(b) that the application for permission to prepare a settled statement must be verified. 2. Revised rule 34.2(h)(3) provides that copies of additional or corrected pages of the not-yet-certified record must be sent to "the parties." The commentators assert the word should be "trial and pretrial counsel." 3. Revised rule 34.2(i)(1) requires the reporter to prepare one copy of the reporter's transcript "for each codefendant sentenced to death." The commentators assert the reporter should prepare two copies for each codefendant—one for appellate counsel and one for habeas corpus counsel.	2. Agree in part. The provision has been changed to require the pages to be sent "to trial counsel." (Compare revised rule 34.2(f)(1)–(2).) 3. Agree. In addition, the qualifying phrase, "sentenced to death," is incorrect; it has been changed to read, "against whom the death penalty is sought."
103.	34.2	Thomas E. Pringle President Cal. Court Reporters Assn.	Y	1. When the preliminary record is certified, revised rule 34.2(i)(1) requires the clerk to "promptly" notify the reporter to prepare copies of the reporter's transcript. The reporters' association urges that "promptly" be followed by a specific time limit such as 5 days, so that the reporter is assured of receiving notice to prepare the transcript within a reasonable period. 2. Revised rule 34.2(i)(3) requires the reporter to place any computer-readable copy of a sealed transcript "on a separate disk." The reporters' association urges that the quoted phrase be changed to read, "On a separate disk *or CD*."	1. Disagree. Revised rule 34.2(i)(5) allows the reporter 20 days to prepare the transcript *after being notified* by the clerk to do so. Thus any delay by the clerk *before notifying* the reporter cannot affect the reporter. 2. Disagree. Under revised rule 34.2(i)(2), the format of computer-readable transcripts will be prescribed by the Supreme Court in conjunction with the Legislature, not by these rules.
104.	34.2	Cheryl A. Geyerman Appellate Court Com.	Y	In revised rule 34.2(j), delete the qualifier "superior court" from the phrase, "for inclusion in the superior	Agree. The qualifier has been deleted.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
		San Diego Bar Assn.		court record."	
105.	34.2	Thomas E. Pringle President Cal. Court Reporters Assn.	Y	1. Same as preceding comment, except that the commentators would delete only "superior." 2. Revised rule 34.2(*l)* provides that if the death penalty is no longer being sought, "the clerk must promptly notify the reporter that this rule does not apply." The reporters' association urges that "promptly" should be qualified by a specific time limit, and that the rule should provide for compensating a reporter in that event for any work done.	1. Disagree. "Court" is also superfluous. 2. Disagree. It cannot be presumed that clerk's offices will unduly delay giving this notice in the few cases in which it may become necessary to do so. The proposed compensation provision is beyond the scope of this rules revision project.
106.	34.2	Dennis Peter Maio Director Capital Central Staff Supreme Court	N	1. Delete revised rule 34.2 in its entirety: there is no further need to prepare and certify the preliminary record separately from the trial record, because of trial court consolidation. 2. To be consistent with the Penal Code, use "preliminary examination" rather than "preliminary hearing" in subdivisions (a)(1) and (e)(1) of revised rule 34.2. 3. In revised rule 34.2(b)(1)–(2), make the following change: the clerk "must promptly enter the information [i.e., intent to seek death penalty] in the ~~record~~ court file." 4. Revised rule 34.2(f)(1) states: "If a different attorney represented the defendant in pretrial proceedings, both attorneys must perform the tasks required by (2) [i.e., review the pretrial record for errors or omissions]." The commentator suggests inserting "or the People" after "defendant."	1. Disagree. Separate processing for the preliminary record is necessary: the counties prepare preliminary records and trial records in different ways. 2. Agree. The word "examination" is now used. 3. Agree. The words "court file" are now used. 4. Agree. The words "or the People" have been inserted.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				5. In revised rule 34.2(g)(3), change "transcribed" to "reported." 6. To conform the rule on preliminary proceedings with the rules on trial proceedings (revised rules 35.1, 35.2), change revised rule 34.2(g)(5)–(6) to require that the court certify the record of the preliminary proceedings as "complete and accurate" rather than "correct and complete."	5. Agree. The word has been changed. 6. Agree. The phrase has been changed. (See also revised rule 34.2(i)(1).)
107.	35	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	Revised rule 35 should explain that it applies only to appeals from judgments imposed after trials that began on or after Jan. 1, 1997, either in its title or by adding an "application" subdivision.	Disagree. By the time the rule takes effect, there will be few if any pre-1997 cases still in the record-certification stage, and any counsel handling a pre-1997 case will understand it is governed by revised rule 35.3, as stated in the Advisory Committee Comment to rule 34.2 and the title and subdivision (a) of rule 35.3.
108.	35	Maurice H. Oppenheim Attorney at Law	N	Revised rule 35(a)(1) provides, "The clerk must *promptly—and no later than five days after the judgment of death is rendered*—notify the reporter to prepare the reporter's transcript." The commentator asserts that the italicized two-step time limit (1) is unnecessary micromanagement of the clerk's office and (2) plants the seed of routine five-day interpretations of the term "promptly" wherever it is used in the rules. He proposes simply: "Within five days after the judgment is rendered, the clerk must notify . . ."	Disagree. The provision tracks former rule 39.53(b)(2), and is not without purpose: it puts an outside limit of 5 days on the permissible interpretation of "promptly" in this context, thus serving the pressing need for the reporter to begin preparing the transcript as soon as possible. On the contrary, the commentator's suggested wording might encourage clerks to take 5 days in every case, which would be counterproductive.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
109.	35	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	Revised rule 35(a)(2) requires an original and 8 paper copies of the clerk's transcript and revised rule 35(b)(1) requires an original and 5 paper copies of the reporter's transcript. The commentators assert that the ensuing rules do not call for this many paper copies.	Disagree. Revised rule 35(c) calls for 2 copies of the clerk's transcript and 2 copies of the reporter's transcript (for trial counsel); revised rule 35.1(g) calls for 5 copies of the clerk's transcript (for appellate counsel, habeas corpus counsel, the Attorney General, the California Appellate Project, and the Habeas Corpus Resource Center) and 2 copies of the reporter's transcript (for appellate counsel and habeas corpus counsel); and revised rule 35.2(e)(3) calls for one copy of the clerk's transcript and one copy of the reporter's transcript for the Governor. The revised rules track the former rules on this point.
110.	35	Maurice H. Oppenheim Attorney at Law	N	Revised rule 35(c) states that if trial counsel does not receive the transcripts in 30 days, "counsel must promptly notify the superior court." The commentator urges us to be more specific; he says that a letter addressed simply to "the superior court" "could wind up anywhere," including being returned to sender.	Disagree. The revised rule tracks the statute (Pen. Code, sec 190.8, subd. (b)). Counsel should notify the trial judge, who is in the best position to supervise the clerk and the reporter. The style of these and many other rules is to refer to the trial judge as "the superior court."
111.	35.1	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	Revised rule 35.1 should explain that it applies only to appeals from judgments imposed after trials that began on or after Jan. 1, 1997, either in its title or by adding an "application" subdivision.	Disagree for the reasons stated in response to comment 107.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
112.	35.1	Thomas E. Pringle President Cal. Court Reporters Assn.	Y	Revised rule 35.1(a) requires trial counsel to "call the [trial] court's attention to any errors or omissions they may find in the transcripts" during trial, and provides that the court "*must* periodically ask counsel for a list of any such errors or omissions and *may* hold hearings to verify them." The commentators propose that "The word 'periodically' should be followed by language requiring a hearing [after] at least ten days of reported proceedings." They assert it is important that there be a time limit "so corrections are made timely and while memories are fresh."	Disagree. The revised rule tracks the statute (Pen. Code, sec 190.8, subd (c)). If the commentators mean that the court should be *required* to hold a hearing every 10 days on whether errors or omissions have been found in the daily transcripts, such a requirement would be too intrusive on the conduct of the trial. The Legislature has deliberately confided the matter to the discretion of the court.
113.	35.1	Judge Roger D. Randall Kern Superior Court	N	The commentator asserts it is difficult, if not impossible, for appellate counsel, who are often not appointed until long after the trial is over, to assist the court in correcting the record; at most, appellate counsel should propose only additions to the record, leaving the matter of corrections to trial counsel. The commentator proposes adding a provision to revised rule 35.1(b) requiring trial counsel to review the record for *errors* as well as omissions, and deleting the provision of revised rule 35.2(a) requiring appellate counsel to review the record for errors—or limiting that provision to exclude errors in the reporter's transcript.	Disagree. The revised rules track the former rules on these points, and both follow the requirements laid down by the Legislature in Penal Code section 190.8. The commentator's proposals would be inconsistent with the statutory scheme.
114.	35.1	Kent Barkhurst Sr. Dep. State Public Defender Office of the State Public Defender	Y	Revised rule 35.1(c)(2) provides that a counsel's request for additions to the reporter's transcript "*must* state the nature and date of the proceedings and identify the reporter who transcribed them." The commentator asserts that it may be difficult or impossible for habeas corpus counsel to identify the reporter years after the trial, and asks that it be mandatory to do so only when the information is known to counsel.	Agree. The revised rule has been changed to require a statement of the reporter's identity only "if known."

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
115.	35.1	Thomas E. Pringle President Cal. Court Reporters Assn.	Y	In revised rule 35.1(c)(2) (quoted in preceding comment), the word "reported" should be substituted for "transcribed." These are requests to *transcribe* proceedings that have already been reported.	Agree. The word has been changed to "reported."
116.	35.1	Maurice H. Oppenheim Attorney at Law	N	1. Revised rule 34.2(g)(4) requires the designated judge to "fix" a date for compliance. Because "fix" assertedly has "a sinister meaning" of corruption, it should not be used in the rules. "Set" would be a suitable alternative. 2. Revised rule 35.1(d)(3) uses same phrase ("The clerk must promptly—and in any event within five days— ") that the commentator criticizes in comment 108.	1. Disagree for the reasons stated in response to comment 101. 2. Disagree for the reasons stated in response to comment 108.
117.	35.1	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	1. Revised rules 35.1(d)(4) & (6) provide that copies of additional or corrected pages of the not-yet-certified record must be sent to "the parties." The commentators assert the quoted reference should be to "trial counsel." 2. Revised rule 35.1(e)(1) requires the reporter to prepare an additional computer-readable copy of the reporter's transcript "for each codefendant sentenced to death." The commentators assert the reporter should prepare two copies for each codefendant—one for appellate counsel and one for habeas corpus counsel.	1. Agree. The reference has been changed. 2. Agree. The rule has been changed to so provide.
118.	35.1	Thomas E. Pringle President Cal. Court Reporters Assn.	Y	Revised rule 35.1(e)(1) requires the clerk to "promptly" notify the reporter to prepare computer-readable copies of the transcript. The reporters' association proposes that the term "promptly" be qualified by adding a specified time limit, e.g., "not to exceed five days."	Disagree. Revised rule 35.1(e)(5) allows the reporter 10 days to prepare the computer-readable copies *after being notified* by the clerk to do so. Thus any delay by the clerk *before*

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
					notifying the reporter cannot affect the reporter.
119.	35.1	Dennis Peter Maio Director Capital Central Staff Supreme Court	N	1. In revised rule 35.1(c), refer to "corrections or additions" rather than "additions or corrections." 2. In revised rule 35.1(c)(2), change "transcribed" to "reported."	1. Disagree. The focus of revised rule 35.1 is on additions rather than corrections. 2. Agree. The word has been changed.
120.	35.2	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	1. Revised rule 35.2 should explain that it applies only to appeals from judgments imposed after trials that began on or after Jan. 1, 1997, either in its title or by adding an "application" subdivision. 2. Revised rule 35.2(a)(1) provides that "Within 90 days after the clerk delivers the record to appellate counsel, any party may serve and file a request for corrections or additions." Insert the word "defendant's" before "appellate counsel." 3. In revised rule 35.2(a)(1), quoted in the preceding comment, insert the phrase "appellate counsel for" before "any party."	1. Disagree for the reasons stated in response to comment 107. 2. Agree. Former rule 39.55(b) so provided. 3. Disagree. The phrase is superfluous: in this context, parties always act through their appellate counsel.
121.	35.2	Kent Barkhurst Sr. Dep. State Public Defender Office of the State Public Defender	Y	Revised rule 35.2(a)(2) provides that a counsel's request for additions to the reporter's transcript "*must* state the nature and date of the proceedings and identify the reporter who transcribed them." The commentator asserts that it may be difficult or impossible for habeas corpus counsel to identify the reporter years after the trial, and asks that it be mandatory to do so only when the	Agree. The revised rule has been changed to require a statement of the reporter's identity only "if known."

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				information is known to counsel.	
122.	35.2	Thomas E. Pringle President Cal. Court Reporters Assn.	Y	In revised rule 35.2(a)(2) (quoted in preceding comment), the word "reported" should be substituted for "transcribed." These are requests to *transcribe* proceedings that have already been reported.	Agree. The word has been changed to "reported."
123.	35.2	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	Revised rule 35.2(c)(1) requires the reporter to prepare an additional computer-readable copy of the reporter's transcript "for each codefendant sentenced to death." The commentators assert the reporter should prepare two copies for each codefendant—one for appellate counsel and one for habeas corpus counsel.	Agree. The rule has been changed to so provide.
124.	35.2	Dennis Peter Maio Director Capital Central Staff Supreme Court	N	1. In revised rule 35.2(a)(2), change "transcribed" to "reported." 2. Revised rule 35.2(d)(4) provides, "If the court orders an extension of time, the court may conduct a status conference or require the defendant's appellate counsel to file a status report on counsel's progress in reviewing the record." The commentator suggests requiring the same for the People's appellate counsel, if it is that counsel who requested the extension.	1. Agree. The word has been changed. 2. Agree. The provision has been reworded to provide for a status report by "the counsel who requested the extension."
125.	35.3	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	To be consistent with revised rule 35.2(e), add the Habeas Corpus Resource Center to the list of entities entitled to receive a computer-readable copy of the reporter's transcript in revised rule 35.3(b)(1)–(2).	Agree. Revised rule 35.3(b) has been changed accordingly.
126.	35.3	Michael Laurence Director	Y	Same as preceding comment.	Agree.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
		Habeas Corpus Resource Center			
127.	35.3	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	1. In revised rule 35.3(c)(1), insert the phrase "appellate counsel for" before "any party." 2. Revised rule 35.3(c)(4) authorizes the judge to order preparation of a settled statement under revised rule 32.3 of any portion of the proceedings that cannot be transcribed. The commentators reiterate an objection they made to rule 32.3, i.e., that it deletes as an unnecessary formalism the requirement of former rule 36(b) that the application for permission to prepare a settled statement must be verified.	1. Disagree. The phrase is superfluous: in this context, parties always act through their appellate counsel. 2. Disagree. The objection is unpersuasive for the reasons stated in the response to comment 73.1.
128.	35.3	Maurice H. Oppenheim Attorney at Law	N	In revised rule 35.3(c)(4), change "fixing the time for performance" to "setting the date for completion."	Disagree for the reasons stated in response to comment 101.
129.	35.3	Dennis Peter Maio Director Capital Central Staff Supreme Court	N	In revised rule 35.3(c)(7) and (d), change "accurate and complete" to "complete and accurate," in order to track the wording of revised rules 35.1 and 35.2.	Agree. The changes have been made.
130.	36	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	1. Simplify revised rule 36 (c)(1)(A)–(D) by combining proposed (A) with (B) and (C) with (D). 2. In revised rule 36(c)(1), require the Supreme Court clerk to notify not only the Attorney General but also the defendant's appellate counsel of the due date for the respondent's brief.	1. Agree. Revised rule 36 (c)(1) has been rewritten accordingly. 2. Agree. Revised rule 36 (c)(1) has been rewritten accordingly.

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
131.	36	Michael G. Millman Director California Appellate Project	Y	1. Revised rule 36(b)(1)(A) provides that an appellant's opening brief produced on a computer must not exceed 78,400 words. This figure is intended to translate into word count the figure of 280 pages stated in former rule 37(d), using a ratio of 280 words per page. 280 words per page is the ratio used to make this translation in the rules governing appeals in civil cases (see rule 14(c)); it is said to be the average number of words on an 8-1/2 x 11 page, *double-spaced*. But rule 14(b)(5) also permits the text of briefs to be *one-and-a-half-spaced* ("The lines of text must be unnumbered and at least one-and-a-half-spaced."). The average word count of a page that is one-and-a-half spaced is approximately 340 words, or some 21 percent more than that allowed by the revised rule. The revised rule thus penalizes defendants whose counsel use one-and-a half spacing in their briefs. It should be changed to reflect a word count consistent with 280 pages of one-and-a-half-spaced text.	1.
				2. Like former rule 39.57, revised rule 36(f) does not specify whom defendant's counsel should serve.	2. Agree, but the gap has been filled by specifying in revised rule 36(g)(1) that the Supreme Court policy on Service of Process by Counsel for Defendant governs service of defendant's briefs. That policy spells out the requirements in detail.
				3. A cross-reference to the rule on filing amicus curiae briefs in the Supreme Court should be added to revised rule 36.	3. Agree. The reference is now revised rule 36(e).

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				4. A cross-reference to the rule on the number of copies of briefs to be filed in the Supreme Court (rule 44(b)) should be added to revised rule 36. 5. A cross-reference to the rule on the color of the covers of briefs to be filed in the Supreme Court (rule 44(c)) should be added to revised rule 36.	4. Disagree. There is no such cross-reference to rule 44(b) in any of the appellate rules, civil or criminal. 5. Disagree. There is no such cross-reference to rule 44(b) in any of the appellate rules, civil or criminal.
132.	36	Cheryl A. Geyerman Appellate Court Com. San Diego Bar Assn.	Y	The commentators make the same points as comments 131.3–5.	Same responses as the responses to comments 131.3–5.
133.	36	Dennis Peter Maio Director Capital Central Staff Supreme Court	N	The commentator asserts that "A petition for rehearing is not so much a brief as . . . an application."	Disagree. In the context of the appellate rules it is deemed a brief: rule 40(i) provides that "The word 'briefs' includes petitions for rehearing . . . ."
134.	36.2	Cheryl A. Geyerman Appellate Court Com.San Diego Bar Assn.	Y	1. Rule 36.2(a) states that rule 29.2 governs oral argument and submission of the cause in death penalty appeals "unless the court provides otherwise in its Internal Operating Practices and Procedures or by order." The commentators urge that the relevant part of those Practices and Procedures be incorporated in the rule *in haec verba* rather than simply be cross-referenced. 2. Rule 36.2(b)(3) should be corrected to provide, as stated in the Advisory Committee Comment to that rule, that two counsel may argue on each side if they notify the court "within 10 days after the date of the order setting	1. Disagree. This provision tracks the identical wording of rule 29.2(a), governing oral argument in the Supreme Court in civil appeals. The reason for the cross-reference was to avoid formalizing, in the text of a rule, a provision that the Supreme Court may want to amend informally, as part of its Practices and Procedures. The same reason applies here. 2. Agree. The rule will be amended to so provide.

† On behalf of a group: Y = Yes; N = No

NO.	RULE	COMMENTATOR	†	COMMENTS	COMMITTEE RESPONSE
				the case for argument."	